(1)

Supreme Court, U.S.
FILED

96 704 SEP 26 1996

OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

Edward H. Patterson and Barbara Morley, Husband and Wife and American Central City, Inc., A Nebraska Corporation,
Petitioners,

v.

City of Lincoln. Nebraska, A Municipal Corporation,
Respondents.

On Petition for Writ of Certiorari
To The Supreme Court of Nebraska

PETITION FOR WRIT OF CERTIORARI

R. Kent Radke
Counsel of Record
The Apothecary
Suite 150
140 North 8th Street
Lincoln, Nebraska 68508
(402) 476-6585

RECEIVED
NOV - 5 1996
OFFICE OF THE CLERK
SUPREME COURT, U.S.

33 pp

QUESTIONS PRESENTED

The City of Lincoln, Nebraska condemned an assemblage of land adjacent to the University of Nebraska. At trial, the City of Lincoln's appraisers relied on sales to establish "market value." Patterson was prevented from entering testimony based on the "net present value" ("capitalization of income") method, or in the case of development land, the "development cost" method.

1. Can "market value" be determined by relying exclusively on sales not properly adjusted for distance in time and location or differences in size or zoning, that were not arm's length transactions, and not subject to the same economic forces as the condemned property, while excluding sales, without good cause, more proximate in time and location?

2. Is the "net present value" method an appropriate technique for valuing condemned development land if it is based on a computer-spreadsheet model with concrete and verifiable input parameters?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED. i

TABLE OF AUTHORITIES. iii

OPINION BELOW. 1

JURISDICTIONAL STATEMENT. 1

CONSTITUTIONAL PROVISIONS AT ISSUE. 1

STATEMENT OF THE CASE. 2

PROCEEDINGS BELOW. 7

HOW THE FEDERAL QUESTION WAS PRESENTED. 8

REASONS FOR GRANTING THE WRIT
I. Just Compensation is an Important Federal Question 9

II. The Courts are Split on the Use of the Income Method for Valuing Undeveloped Land Where the Highest and Best Use is as an Income-Producing Property. 15

III. When the Landowner in an Urban Development Condemnation is Not Made Whole, He is no Longer in the Same Position to Reinvest in Equivalent Property, His Wealth is Redistributed to Special Interest Groups, and His Constitutional Guarantee of Just Compensation Has Been Denied 22

IV. The Nebraska Supreme Court Ruling is Wrong. 24

APPENDIX A: Nebraska Supreme Court Opinion 1
APPENDIX B: Analysis of Comparable Sales Used by Mr. Frost and Mr. Wilson 9

TABLE OF AUTHORITIES CITED

Page

Allison v. Tico Title Ins. Co., 979 F.2d 1187 (7th Cir. 1992). 15

Almota Farmers Elevator Warehouse Co. v. United States, 409 U.S. 470 (1973). 10

City and County of Honolulu v. Bishop Trust Co., 404 P. 2d 373 (Hawaii 1965) 15

Dash v. State of Alaska, 491 P.2d 1069 (Ala. 1971) 15,18

Fairfield Gardens, Inc. v. United States, 306 F.2d 167 (9th Cir. 1962) 10

First Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987). 11

Fruit Growers Express Co. v. City of Alexandria, 221 S.E. 2d 157 (Va. 1976) 15

Iske v. Metropolitan Utilities Dist. of Omaha, 157 N.W. 2d 887 (Neb. 1968). 18

Iske v. Omaha Public Power Dist., 178 N.W. 2d 633 (Neb. 1970). 18

Kimball Laundry Co. v. United States, 338 U.S. 1 (1949). 10

McArthur v. Papio-Missouri Nat. Res., Dist., 547 N.W. 2d 716 (Neb. 1996) 17

Monongahela Navigation Co. v. United States,
148 U.S. 312 (1893). 9

Olson v. United States, 292 U.S. 246 (1934). 9,25

Patterson v. City of Lincoln,
550 N.W. 2d 650 (Neb. 1996). 7

Ramsey v. Miller, 316 N.W. 2d 917 (Minn. 1982). 15,16,18

Tacchino v. State of Nevada,
508 P.2d 1212 (Nev. 1973). 18

United States v. Certain Land,
346 F. 2d 690 (2d Cir. 1965). 14

United States v. Chandler-Dunbar,
229 U.S. 53 (1913). 9

United States v. Commodities Trading Corp.,
339 U.S. 121 (1950). 9

United States v. 819.98 Acres of Land,
78 F.2d 1468 (10th Cir. 1996). 15

United States v. Eden Memorial Park Ass'n,
350 F.2d 933 (9th Cir. 1965). 15

United States v. 50 Acres, 469 U.S. 24 (1984). 13

United States v. Fuller, 409 U.S. 488 (1973). 9

United States v. General Motors Corp.,
323 U.S. 373 (1945). 13

United States v. Miller,
317 U.S. 369 (1943). 9,10,13,19,24

United States v. New River Collieries,
262 U.S. 341 (1923). 9

United States v. Willow River Power Co.,
342 U.S. 499 (1945). 9,24

United States v. 100 Acres Land, 468 F.2d
(9th Cir. 1972), *cert. denied*, 414 U.S. 864 (1973). 12,25

United States v. Reynolds, 397 U.S. 14 (1970). 9

United States v. 3,727.91 Acres of Land,
563 F.2d 357 (8th Cir. 1977). 15

*United States v. Toronto, Hamilton & Buffalo
Navigation Co.*, 338 U.S. 396 (1949). 13,16

United States v. 25.406 Acres of Land, 172 F.2d 990
(4th Cir. 1949), *cert. denied*, 337 U.S. 931 (1949). 15,17

United States v. Virginia Electric & Power Co.,
365 U.S. 624 (1961). 13

UNITED STATES CONSTITUTION

Fifth Amendment 1, 8, 9, 23, 24

Fourteenth Amendment 1, 8, 9

MISCELLANEOUS

Charles C. Geisler, *Land and Poverty in the United States:
Insights and Oversights*, Land Economics (1995) 23

William K. Jones, *Confiscation: A Rationale of the Law of
Takings*, 24 Hofstra L. Rev (1995) 24

Frank I. Michelman, *Takings*,
88 Colum. L. Rev. (1988) 23

Uniform Eminent Domain Code, sec. 1110 (1975) 17

5 Nichols on Eminent Domain, sec. 19.01[2] (1993). 16

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1995

EDWARD H. PATTERSON and BARBARA MORLEY. Husband and Wife and AMERICAN CENTRAL CITY, INC., A Nebraska Corporation, *Petitioners*,

v.

CITY OF LINCOLN, NEBRASKA, a Municipal Corporation, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE NEBRASKA SUPREME COURT

Edward H. Patterson, Barbara Morley, and American Central City, Inc. respectfully petition for a writ of certiorari to review the judgement of the Supreme Court of Nebraska in this case.

OPINION BELOW

The opinion of the Supreme Court of Nebraska (App.A, 1-8) is reported in 250 Neb. 382, 550 N.W.2d 650 (1996).

JURISDICTIONAL STATEMENT

The judgement of the Nebraska Supreme Court was entered on June 28, 1996. The petition for writ of certiorari was filed on September 26, 1996. The court has jurisdiction over this matter pursuant to 28 U.S.C. Sec. 1257(a).

CONSTITUTIONAL PROVISIONS AT ISSUE

The federal constitutional provisions at issue in this matter are the Fifth and Fourteenth Amendments to the United States

Constitution. The Fifth Amendment provides in part: "[N]or shall private property be taken for public use without just compensation." The Fourteenth Amendment provides in part: [N]or shall any state deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

This case is a determination of just compensation for condemned real estate located in Lincoln, Nebraska. The City of Lincoln, under its eminent domain powers, took an assemblage of land from Petitioners Edward H. Patterson, Barbara Morley, and American Central City, Inc., a Nebraska corporation. Mr. Patterson was the president and sole stockholder of American Central City, Inc. (hereafter petitioners will be referred to as "Patterson").

Mr. Patterson acquired the property lot by lot, over a period of 18 years, commencing in 1972 (22:7; 33:15-16) and culminating in June of 1988. (92:22-24) Mr. Patterson, who has a B.A. in Mathematics, an M.B.A. with a specialization in Real Estate Finance from the University of Nebraska, and coursework sufficient to complete an M.S. in Electrical Engineering, is an experienced draftsman, and a telecommunications expert, focused his real estate investment in an area adjacent to the downtown campus of the University of Nebraska. (22:19-24) His decision to be near the University campus was based on a desire for a stable real estate environment and his goal of assembling enough land for the development and construction of an office-residential building or mid-rise apartments with a telecommunications facility adjacent to and in conjunction with future development by the University of Nebraska. (28:24-25; 29:1; 54:21-25; 55:1-5) Through his own efforts, he either purchased personally, purchased at auction, by contract, or by purchase from estate or conservatorship all of the real estate involved in the condemnation action. As he acquired each of the properties, he demolished blighted houses, planted grass, and maintained the property until his goal of total assemblage was

attained. Patterson's goal was to be realized in conjunction with the development of a Research and Development Center, as specified in the 1967 University of Nebraska (UNL) campus twenty-year plan, on the adjacent property owned by University of Nebraska (hereafter referred to as the "Beadle Biotechnology Center"). The Beadle Biotechnology Center, which was under development at the time of condemnation, was not a part of the public project for which Patterson's land was condemned. In 1990, interest rates were declining to a level which would make financing conducive for development and construction. (49:20-25; 50: 1-19)

The subject property at the time of taking was zoned R-6, which allowed residential and apartment use. (117:22-23; 235:1; 294:11-12) Based on the total assemblage of land achieved by Patterson, and the zoning classification, Patterson could legally construct 218 units on the property. (120:21-23; 195:12-14; 308:15-17) Architect's plans were admitted into evidence demonstrating that 218 units was practically possible. (E9-E10) Patterson testified that his opinion of the "market value" of the property on May 25, 1990, without giving any regard to income-producing abilities of the property, was $10,000/unit. (64:18-23) When based upon the maximum number of units that the property would support (218), Mr. Patterson's opinion of value was $2,180,000.00. Mr. Patterson based this on the only other land assembly sequence done in the 1980's in the neighborhood, which terminated in 1989, prior to decreasing interest rates, with an unadjusted acquisition cost at the rate of $7,300/unit. Mr. Patterson testified that the property, which was three blocks further east of the campus, was in an inferior location to his property. (Time sequence sale analysis is covered in Appendix B under "Purchase Price Not Discounted to Time of Buildability").

Mr. Patterson also testified that he had valued the land using a "capitalization of income" method (also called the development cost approach when the land must be developed) (hereafter called the "income method"). (67:12-15) He further testified as to his expertise in being able to give an opinion as to

such an evaluation. (67:16-25; 28:1-3) When asked whether he had an opinion of the fair market value of the land as of May 25, 1990, using the income or development cost based valuation, (84:3-8), Mr. Patterson said "yes." The City of Lincoln objected to Mr. Patterson giving this opinion, and the trial court sustained the objection. (84:9-17) An offer of proof was made that Mr. Patterson's opinion of value, based on the income method, was $4,470,330. (85:4)

Patterson called two expert witnesses to give their opinion of value of the property. The first of Patterson's expert witnesses, Mr. Hassebrook, a licensed real estate appraiser, after being qualified as an expert, (E11, 107:13-18) testified that, because of the unique way the property was assembled, and the fact that 218 units could be built on the property, the value of the property was $4,000.00/unit or a total fair market value of $872,000.00. (152:3-9) Mr. Hassebrook testified that the subject property was uniquely located relative to the University of Nebraska (110:6-11), was close to the downtown area, including the State Capitol and the County-City Building (110:11-18), and access to other areas of the City was favorable. (111:6) Mr. Hassebrook further testified that the demand for apartment growth in this area was strong, particularly demand for student housing (12:10-17) and that the assemblage of property attained by Patterson ***was not comparable*** to any other assemblages in the immediate area (179:24-25; 180:1-7) and that the location was excellent. (181:15-16; 182: 14). For these reasons, he was not able to locate true comparable sales, and was forced to use sales that were distant in location and with lesser investment potential than the Patterson land to make his estimate of value based on sales, and was required to make excessive adjustments. (E15)

Mr. Hassebrook also did a rental complex survey that showed that there was in Lincoln, Nebraska a ***$100 (approximate) per month rental increment solely attributable to being near the campus***, thus demonstrating that the land had added value because of its situs near the University campus as

opposed to outlying locations. (149: 24-25; 151: 13) The City of Lincoln objected to Mr. Hassebrook's opinion using these data to enter a quantitative estimate of value of this $100 stream based on income capitalization and the trial court sustained the objection. (155:24)

Patterson's second expert, Mr. Johnson, a licensed real estate appraiser, also attempted to give an opinion to the valuation of the property using the income method. He testified that appraisers used both the income and the comparable sales methods. Mr. Johnson attempted to reach actual value by reconciling values found with each approach. The City of Lincoln objected and the trial court sustained the objection. (191:15-25) Mr. Johnson further testified to the uniqueness of the property and the ***difficulty of finding comparable sales***. (200:25; 201:1)

Appraisers for the City of Lincoln testified that the income method was inappropriate for undeveloped land, and relied exclusively on sales to determine market value. The first of the City of Lincoln's appraisers, Mr. Frost, testified that he used sales from 1981 to 1990, largely of different zoning, **none** of which were adjusted for differences in time, proximity of location, degree of assemblage, and zoning. Many were not arm's lengths transactions (E22). Mr. Frost testified that the market was flat, and he therefore did not need to adjust sales. (240:2) Patterson objected to Mr. Frost's valuation using these sales as an inappropriate measures of damages, and the trial court overruled the objection.(261:23)

The City of Lincoln's second appraiser, Mr. Matthew Wilson, testified to "market value." His sales overlapped with those of Mr. Frost, and were also not properly adjusted for time, location, zoning, degree of assemblage, etc. He testified that he omitted using the sales closest in time to the taking because his market research in the subject neighborhood was done prior to these sales being filed. (322:7-13) In other words, Mr. Wilson testified that his research for forming his opinion as to "market

value" was done approximately one year prior to the actual date of taking. Patterson objected to Mr. Wilson's opinion because it was based on an inappropriate measure of damages. The trial court overruled the objection.

The City of Lincoln's two appraisers valued the land at $1,750/unit and $1,500/unit, respectively, for a total of $381,500 and $325,000, respectively.

The City of Lincoln was also allowed, over objection, to show pictures of blighted houses that were not present at the time of the condemnation. (E23-34)

The verdict differed from market value determined by (1) Mr. Patterson to be $10,000 based on the only other land assembly sequence done in the 1980's in the neighborhood, terminating in 1989, prior to buildable interest rates, with unadjusted acquisition at the rate of $7,300/unit, in an inferior location three blocks east of campus; (2) Mr. Hassebrook to be $4,000/unit based on the only recent large (88 units, buildable by special permit) single parcel sale at the rate of $4,000/unit in an inferior location; (3) Mr. Hassebrook's valuation of $11,000/unit based on the capitalization of a $100/month rental increment attributable solely to the situs value of the campus border location (the opinion was not admitted into evidence); and (4) Mr. Patterson's estimate of value of $15,000 - $20,000/unit based on a computer spreadsheet, net present value analysis of fully bid, professionally stamped architect's plans over a range of amenities and rent levels (opinion not admitted into evidence; offer of proof made).

The verdict also differed from an independent study done in 1977 by Luedke and Associates (E20) commissioned by the City of Lincoln Urban Development Department that stated that land in the area, including Patterson's land, was selling for $3,000 - $3,500/unit in 1977. The Luedke report advised the City of Lincoln that its acquisition costs for land comprising a section

that included approximately **one-half** of Patterson's land would have been $492,000 **in 1977.** (E20)

PROCEEDINGS BELOW

Patterson appealed the verdict to the Nebraska Appeals Court, and the Nebraska Supreme Court took the case of its own accord. The Nebraska Supreme Court affirmed the jury verdict.

The Nebraska Supreme Court concluded that the sales used by the City of Lincoln's appraiser, Mr. Frost, were competent evidence because:

> He adjusted each comparable sale to minimize the differences between it and the condemned property. He explained each adjustment. He also, where he thought it appropriate, adjusted each comparable sale price to simulate the market conditions at the time of the condemnation of Patterson's property. These adjustments were explained.

Patterson v. City of Lincoln, 550 N.W.2d 650, 653 (Neb. 1996). The court further concluded that Patterson' experts had also used sales, and that was evidence that there were, in fact, "comparable" sales, and that the land had no "intrinsic value."

The court did not discuss the evidence, presented at trial and discussed in Appellant's brief and at oral argument, that neither of the City's appraisers properly adjusted the sales. Dates were not included in their exhibits until cross-examination (E22, E39) Mr. Wilson admitted that he did his appraisal in 1989. (248: 7-13) The court did not address the testimony by Patterson's expert Mr. Hassebrook that there were ***no comparable sales*** and that there was only one sale that was reasonable enough to use in his market data approach, without extremely large adjustments (E16). The court did not address the issue, raised at trial, in Appellant's brief to the court, and at oral argument, that the City of Lincoln's appraisers omitted the

most recent sales and Patterson was deprived of his right to just compensation at the time of taking.

With respect to "intrinsic value," the court did not discuss why the study done by Patterson's expert, Mr. Hassebrook (149: 24-25; 151: 13), demonstrating increasing rents in apartment complexes as distance to the university campus decreased, did not demonstrate that the land had "intrinsic value" due to its situs. This issue was raised in Appellant's brief to the court and at oral argument.

HOW THE FEDERAL QUESTION WAS PRESENTED

Patterson appealed the case to the Nebraska Supreme Court on the basis of the Fifth Amendment Just Compensation Clause as applied to the states through the Fourteenth Amendment. The constitutional issue was clearly stated. In discussing the first proposition, the constitutional standards and the "willing buyers and sellers" and the "make whole" principles were stated. These same principles were raised at oral argument. The Supreme Court of Nebraska did not find that Patterson had been deprived of his constitutional right to just compensation.

REASONS FOR GRANTING THE WRIT

When property is condemned by the state, the Fifth and Fourteenth Amendments require just compensation. The United States Supreme Court has not recently addressed the issue of the "second prong" of the Just Compensation clause -- the method used to value property. This may seem like a well-answered issue, but modern methods of valuation and the susceptibility of "market value" to manipulation by the State compels a reevaluation of the issue. There are conflicting federal and state court decisions with respect to admissibility of the "capitalization of income" method of valuation to supplement or replace "market value" as determined by comparable sales. This method of valuation is also called the development cost approach where the land must be developed (hereafter referred

to as the "income method"). Additionally, the Minnesota Supreme Court and the Fourth Circuit of Appeals have admitted evidence of value based on the income method in cases that are very similar in fact, and identical in principle, to the present case.

The discrepancy among the courts in the admissibility of the income or development cost approach has arisen from two socioeconomic changes. Technological advances resulting in the widespread use of computers have made the income method more precise, while the scarcity of assembled urban land has made the "comparable sales" method for such properties more speculative.

I. Just Compensation is an Important Federal Question. The Fifth and Fourteenth Amendments Require That a Condemned Landowner be Compensated for Market Value at the Time of Taking

a. The Basic Tenet of Just Compensation is Indemnification: a Landowner Must be "Made Whole"

The basic tenet of just compensation is indemnification and arises from the basic equitable principles of fairness. *United States v. Commodities Trading Corp.*, 339 U.S. 121, 124 (1950); *United States v. Fuller*, 409 U.S. 488, 490 (1973). Compensation is 'just' if the condemnee is "made whole." *United States v. Miller*, 317 U.S. 369, 373 (1943), and the condemnee is put in as good a position pecuniarily as he would have been if his property had not been taken. *United States v. New River Collieries*, 262 U.S. 341, 345 (1923); *Olson v. United States*, 292 U.S. 246, 255 (1934); *Miller*, 317 U.S. at 373; *United States v. Reynolds*, 397 U.S. 14, 16 (1970). Compensation is ***just*** only when it is the full equivalent for the property taken. *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 326 (1893) ("There can ... be no doubt that the compensation must be a full and perfect equivalent for the property taken"). The value is what the claimant lost by the taking. *New River Collieries*, 262 U.S. at 345; *United States v. Chandler-Dunbar*

Co., 299 U.S. 53, 76 (1913). One of the purposes of just compensation is to redistribute the economic loss so that it will fall upon the public rather than upon those who "happen to lie in the path of the project." *United States v. Willow River Co.*, 342 U.S. 499, 502 (1945)

Just compensation is generally determined by "market value." The true test of market value is what price will be agreed upon by a willing seller and a willing buyer neither of whom is under a compulsion to sell or buy. *Miller*, 317 U.S. at 374; *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 477 (1973). The willing buyer is presumably a private citizen -- not a government bureaucrat. An eminent domain action is not a voluntary transfer of property rights, and the value therefore a well-informed guess, but market value must be the cash equivalent of the property right had a voluntary exchange taken place. *Kimball Laundry Co. v. United States*, 338 U.S. 1, 6 (1948).

b. "Market Value" Can be Determined by Comparable Sales Only When the Properties Are* In Fact *Comparable

The Supreme Court established that "market value" is often determined by comparable sales. Comparable sales are those that are sales of similar kind at about the same time. For a sale to be admissible and relevant, it must be ***in fact*** comparable. *Fairfield Gardens, Inc. v. United States*, 306 F.2d 167, 172 (9th Cir. 1962) (emphasis added). Sales that are so dissimilar to the condemned property that they cannot establish market value are not "comparable" sales. The rule is that "comparability ... does mean, at the very least, similarity in many respects." *Id.* at 173.

c. "Market Value" is Speculative and Subject to Manipulation When the Sales Used Are Not "Comparable"

When dissimilar sales are admitted to value condemned property, "market value" is speculative and subject to manipulation and abuse. The State undervalues the property taken. The use of dissimilar sales, when more appropriate sales are available, allows appraisers to "pick and choose" from lesser

valued properties and to substitute them for true comparable sales and actual value based on other accepted methods. The Just Compensation Clause is designed to limit the flexibility and freedom of governmental authorities. *First English Evangelical Lutheran Church v. Los Angeles*, 482 U.S. 304, 321 (1987). The Just Compensation Clause requires that the State be restrained from paying less than "market value."

As a matter of law, sales distant in time, of different zoning, and of vastly different size are not "comparable." The discrepancies among the courts in what is considered acceptable, and what is not acceptable, in terms of similarity or dissimilarity is enormous, and goes beyond the broad discretion given to trial courts in such cases. There is a true controversy as to the appropriate measure of just compensation.

In the present case, the use of inappropriate properties allowed the City of Lincoln's two appraisers to testify to values of $381,500 and $325,000, respectively, for the condemned property. The only two sales that were proximate in time and location would have valued the property at ***greater than*** $2,100,000. (64: 13) Mr. Frost testified that his appraisal was independent of Mr. Wilson, the City of Lincoln's second appraiser (279:9 - 280: 16), but on cross-examination, it was shown that identical language described the properties in both appraisals.(280: 1-25; 281: 1)

A summary of the sales (E22) comprising the valuation by the City of Lincoln's appraisers, Mr. Frost and Mr. Wilson are detailed in Appendix B. In addition to the fact that the sales were ***not properly adjusted*** to the time of taking, the sales do not fulfill the requirement of the Just Compensation clause because they are not all arm's lengths transactions, are not complete sales, and are of improper zoning, including special permit developments sites, which are not sales made on the open market. An explanation of why each sale does not fulfill the Fifth Amendment requirement of just compensation is also in Appendix B.

d. When Comparable Sales Distant in Time Are Admitted, but Comparable Sales Close in Time Are Omitted, Fair Market Value Has Not Been Determined at the Time of Taking

When a condemnor's appraisers are allowed to use sales not subject to the same economic conditions as the condemned property, the market value cannot be determined by those sales. A landowner is entitled to be compensated for market value at the time of taking. If the sales used are not comparable, and sales closest in time to the taking are ignored, then the landowner is not compensated for market value at the time of taking. Sales at or near the time of taking are the most appropriate measure. *United States v. 100 Acres of Land*, 468 F.2d 1261, 1265 (1972).

Although the taking was in 1990, the city's appraisers omitted two sales in 1989 that were on the same block as an earlier, included sale. Recessionary interest rate declines and rental market adjustment for the tax reform act of 1986 were just beginning to allow major apartment construction to pick up in Lincoln. The omitted sales showed that market values had risen in 1989 and were continuing to rise in 1990, anticipating even lower interest rates and completion of the Beadle Research Center. The Beadle Research Center was not a part of the public project for which the Patterson property was taken, and Patterson was entitled to full benefit of any rising property value due to its imminent construction.

e. When The Government Knowingly Manipulates "Market Value" to Undervalue Condemned Property, it is Manifest Injustice Not to Award Actual Value

It is manifest injustice to allow a condemnor to take property at less than "market value" after sitting by and watching an individual assemble property that it's own consultant had calculated would cost more than the annual federal block grants would allow them to acquire. In 1977, the City of Lincoln Urban Development Department first became interested in acquiring property in the neighborhood surrounding the

University of Nebraska. The city hired a consulting firm, Luedke and Associates, to determine the manner and cost of acquiring the property in the area, including the land later taken from Patterson. The Luedke report (E20) stated that small parcels of assembled land in the area were selling for $3,000 - $3,500/unit in the 1970's. Contrast this with the City's appraisers' testimony; they testified that the value of the property in 1990 was only $1,750/unit and $1,500/unit, respectively, despite an average 1.5% apartment vacancy rate in the neighborhood, the lowest interest rates in two decades, and imminent completion of the neighboring multi-million dollar Beadle Biotechnology Center.

f. "Market Value" is Not an Absolute Standard or an Exclusive Method of Valuation

The Supreme Court has held that "market value" is "not an absolute standard nor an exclusive method of valuation." *United States v. Virginia Electric & Power Co.*, 365 U.S. 624, 633 (1961). The Supreme Court has recognized two important exceptions to the use of comparable sales. Other methods of determining value are appropriate when (1) the market is too difficult to find or (2) when its application would result in manifest injustice to the owner. *Miller*, 317 U.S. at 369; *Olson*, 292 U.S. at 246. In other words, market value should not be used when market value furnishes an incorrect measure of ***actual value***. *United States v. General Motors Corp.*, 323 U.S. 373, 379 (emphasis added); *United States v. 50 Acres*, 469 U.S. 24, 25 (1984) (O'Connor, S., concurring). When there are too few true comparable sales, then the prices paid (for those sales) cannot be used to predict with any assurance that the prices paid would be repeated in the sale of the now condemned property. *United States v. Toronto, Hamilton & Buffalo Navigation Co.*, 338 U.S. 396, 402 (1949).

The condemned property in the present case was zoned for 218 units and was immediately adjacent to the campus, making it a scarce and valuable resource among University cities. Plans were used at trial to show that 218 units was not only legally

permissible, but factually possible. A recently declared floodplain classification was used to Patterson's advantage by providing otherwise more than zoned clearance for below building parking.

There were no comparably sized properties in the area surrounding the university. (179:24-25; 180:1-7; 200:25; 201:1) The only assembled property was specially zoned, and on which 88 units were built. An 88-unit complex is not subject to the same ***economic factors*** affecting a 218-unit sale. Land that can support >200 unit accrues the advantages of large developments, e.g, favorable interest rates through direct placement of institutional loans and economies of scale in development cost and operating expense. A prospective buyer will consider these factors in an offering price. The fact that vacant land is not easily found in urban settings was recognized by the court in *United States v. Certain Land*, 346 F.2d 690, 691 (2nd Cir. 1965). The court in *Certain Land* concluded that smaller vacant lots, while more commonly available, are of questionable similarity and relevance. Market value of a large cleared assemblage of lots targeted at a location of unique value would necessarily reflect the assembly costs of acquisition, demolition, holding time, taxes, upkeep and predevelopment risk. There is little doubt that "willing vendees and vendors would deem such information relevant." *Id.* at 694.

g. There are Three Ways to Value Property

1. The current cost of reproducing a property less depreciation from all sources, that is, deterioration and functional and economic obsolescence.
2. The value which the property's net earning power will support, based upon a capitalization of net income.
3. The value indicated by recent sales of comparable properties in the market.

...

In the majority of his assignments, the appraiser ... will use all three as a check against each and to test his own judgment. The use of all three approaches is pertinent in

the solution of most appraisal problems; their application is well established in appraisal technique and held to be part of the fundamental process.

United States v. Eden Memorial Park Ass'n, 350 F.2d 933, 935 (9th Cir. 1965) (citing *The Appraisal of Real Estate* (1964).

II. The Courts are Split on the Use Of the Income Method for Valuing Undeveloped Land Where the Highest and Best Use is as an Income-Producing Property

Even though all three appraisal methods are typically used by appraisers, developers, and investors to value land, the courts are inconsistent in allowing experts to use the "income approach" in the courtroom. Some courts have stated that the income method is speculative when applied to undeveloped land, and apply the strict standard that there must be **no** evidence of "market value" using comparable sales. *United States v. 3,727.91 Acres of Land*, 563 F.2d 357 (8th Cir. 1977); *United States v. 819.98 Acres of Land*, 78 F.2d 1468 (10th Cir. 1996). *See also, Fruit Growers Express Co. v. City of Alexandria*, 221 S.E. 2d 157 (Va. 1976); *Allison v. Ticor Title Ins. Co.*, 979 F.2d 1187 (7th Cir. 1992) (interpreting Wisconsin law).

Other courts, however, consider the income method to reflect current appraisal practice and admissible to establish fair market value, and allow it to be used even if there are comparable sales or the sales are questionable. *United States v. 25.406 Acres of Land*, 172 F.2d 990 (4th Cir. 1949), *cert. denied*, 337 U.S. 931 (1949); *Eden Memorial Park Ass'n*, 350 F.2d at 935; *City and County of Honolulu v. Bishop Trust Co.*, 404 P.2d 373 (Hawaii, 1965); *Dash v. State of Alaska*, 491 P.2d 1069 (Ala. 1971); *Ramsey v. Miller*, 316 N.W. 2d 917 (Minn. 1982). At least one court has stated that fears of speculation are diminished, not enhanced, with modern precise and analytical methods. *Ramsey*, 316 N.W. 2d at 921.

The rejection and acceptance of the income method have been referred to as the former rule and the modern rule,

respectively. 5 Nichols' on Eminent Domain, sec. 19.01[2] 1993. In accepting the modern rule, the Minnesota Supreme Court has emphasized the importance of analytical methods in determining the price that a buyer would pay for land, stating:

> With the use of computers, sophisticated buyers and sellers are able to consider accurately a myriad of variables in arriving at a current market value for undeveloped land. The factors involved in the development cost approach are clearly those that are "brought forward" and given "substantial weight" in "fair negotiations" between a willing seller and a willing buyer.

Ramsey, 316 N.W.2d at 922. The court's rationale in *Ramsey* is based on the underlying constitutional principle that other measures of value are relevant as bearing on what a prospective purchaser would have paid, a guiding principle established by the United States Supreme Court in many cases. *E.G., Toronto, Hamilton & Buffalo Nav. Co.*, 338 U.S. at 402, as well as modern evidence rules, which allow the broad admissibility of evidence bearing on value, and on current practices in real estate. *Ramsey*, 316 N.W.2d 917 at 922.

The Minnesota Supreme Court ruled that the income method (called cost approach in this case) was appropriate on a fact pattern very similar, and identical in principle, to the present case. *Ramsey*, 316 N.W.2d 917. In *Ramsey*, the county of Ramsey's appraisers relied on "comparable" sales to value a large parcel of undeveloped condemned land that had as its highest and best use residential development. On cross-examination, it was revealed that the "comparable" parcels lacked desirable features of the condemned land. The condemnee's experts testified that the "comparables" were too dissimilar to determine market value. The trial court did not allow the condemnee's experts to testify to the bases of their opinion of value based on the income (development cost) method, saying that this type of testimony is "inherently speculative" when the property is undeveloped land. The

Minnesota Supreme Court overruled. The Court explained that the development cost approach is designed to reflect, through cash flow analysis, the current ***price a purchaser would pay*** for the land, given the cost of developing it and the probable proceeds from the sale of developed sites. *Id.* at 920. (emphasis added)

Similarly, the Fourth Circuit Court of Appeals has also upheld the use of the income method for undeveloped land where the highest and best use was as an apartment complex. *United States v. 25.406 Acres of Land*, 172 F.2d 990. The expert testimony using the income method was allowed despite the use of comparable sales by the condemnor. In quoting Henry G. Connor, the court stated:

> It is difficult to perceive why testimony, which experience has taught is generally found to be safely relied upon by men in their important business affairs outside, should be rejected inside the courthouse.

Id. at 993. The decisions by the Minnesota Supreme Court and the Fourth Circuit are consistent with the Uniform Eminent Domain Code. The comment to sec. 1110 states that "the witness may consider either the capitalized actual or *reasonable* net rental income from the property for its highest and best use, if the property is of a kind which is bought and sold on that basis in the relevant market." Uniform Eminent Domain Code, sec. 1110, p. 15 (1975)

The Nebraska Supreme Court is inconsistent in how it has treated the "income approach" in valuing undeveloped land. In a recent 1996 decision, the Nebraska Supreme Court approved the development of the "income approach" for farm land where the landowner testified that the highest and best use was as a recreational vehicle (RV) park and used rents from an RV park in Iowa as a basis for his opinion as to value. *McArthur v. Papio-Missouri Nat. Res. Dist.*, 547 N.W. 2d 716 (Neb. 1996). The Nebraska Supreme Court has similarly approved the use of the income method in other cases where the use was

"recreational" even when the anticipated use was remote in time from the condemnation. *Iske v. Metropolitan Utilities Dist. of Omaha*, 157 N.W.2d 887 (Neb. 1968); and the condemnor's experts used the market data method using adjusted comparable sales. *Iske v. Omaha Public Power Dist.*, 178 N.W. 2d 633 (1970).

Other courts have interpreted *Iske* cases to stand for the proposition that value of undeveloped land determined by the income method is admissible in a condemnation action and do not limit it to recreational uses. The Nevada Supreme Court, in relying on the holding in *Iske v. Metropolitan Utilities Dist.*, stated that the income method was admissible to value undeveloped land because "sophisticated investors make decisions on the basis of capitalization of income." *Tacchino v. State of Nevada*, 508 P. 2d 1212 (1973). The Supreme Court of Alaska found the reasoning in the *Iske* cases persuasive, and ruled that the income method was appropriate for valuing land with a highest and best use as an industrial development, even though there were comparable sales. *Dash*, 491 P.2d at 1074

The Minnesota Supreme Court has established the following criteria for introducing the development cost approach (income method):

> ... the party introducing such evidence can lay a proper foundation to show that (a) the land is ripe for development; (b) the owner can reasonably expect to secure the necessary zoning and other permits required for the development to take place; and (c) the development will not take place at too remote a time.

Ramsey, 316 N.W.2d 917 at 922. Clearly, Patterson's land meets these strict criteria. The land had recently been cleared. Mr. Patterson, an experienced design draftsman in large-scale precast and prestressed concrete construction, had drawn plans. The land was zoned for high-density apartments, and the declining interest rate and low vacancy rate in the area, coupled

with initiation of development on the immediately adjacent multi-million dollar Beadle Biotechnology Center, signaled a climate ripe for development.

a. The Income Method to Value Land Reflects How a "Willing Buyer" Would Determine Purchase Price

Market value is determined by what a willing buyer would pay a willing seller. *E.G., Miller*, 317 U.S. at 374. The willing buyer for a large-scale investment property is a major investor. Assembled property is likely to be sold on a national (not local) market. Once the willing buyer has been identified as a large investor, the analysis turns to how the willing buyer would determine the purchase price. The willing buyer of an assembled urban property will look at the property from the perspective of the rents that would be derived from developing the property in its highest and best use. Rents are determined by comparing rents throughout the area, the vacancy rate, and prospective changes in the area. In the present case, the zoning, the plummeting interest rate, higher rents in the area surrounding the university than in other areas of the city, 1.5% vacancy rates, and the development of the Beadle Biotechnology Center were among the factors that a willing buyer would have considered. The construction of the Beadle Research Center was not part of the public taking, and Patterson should have been allowed to reap the benefits of increased value due to the imminence of its construction.

A major investor will likely turn to a series of successively more detailed income capitalization-based analyses of prospective development of the land. The income method provides the most accurate estimate of value from a large number of input parameters that buyers and sellers take into consideration when negotiating a price for property, and the use of numerical analysis and computers are now routine in development and construction.

In the present case, Patterson and two licensed real estate appraisers were qualified as experts, and would have provided

testimony based on the most accurate possible application of the income method, discounting back to the condemnation date cash flows into and out of the development schedule based on a fully bid set of professionally stamped architect's plans for the development. Patterson, who has expertise in telecommunications and computer technology, had developed a spreadsheet that allowed sophisticated input parameters for developing his land.

The so-called "net present value" of the cash flows is the sum of the discounted cash flows into the project net of the discounted cash flows out, discounted to a particular date (the condemnation date). With the cost of the land being represented as just another cash flow out of the project schedule, the value of the land is that cash flow out for land which makes the "net present value" of the project zero. At this point the willing buyer is earning the appropriately calculated discount rate on all monies which he has put into the development. If he pays more he would earn a lower rate, and would look to alternative investments on which an appropriate rate of return on investment may be obtained.

If allowed to offer an opinion of value relying on the income method, Patterson and his experts would have also explained the following, as checks of the computer spreadsheet net present value model, and checks for the reasonableness of "comparables" offered in opposition to it:

a. A reasonable "rule of thumb" for the sale price of land near the date of buildability of a large-scale development in an intensely developed area where land is scarce and demand is high, and there is no threat of condemnation, is that the land value should be 10% to 20% of the finished project cost including land, labor, materials, construction period interest, etc.

Two properties in downtown Lincoln, Nebraska served as examples of high end estimates on total development cost. During the distressed period of the 1980's, Windsor Place and

University Towers in the Remodeled 1930's Stuart Building, one block south of the University campus managed to sell units well into the $120,000 range.

On the low end three story, stick built, low amenity, minimally architected building plans were thrown into uncleared sites of opportunity in the same general area south, east, and west of the campus and the downtown office district costing from $30,000 to $60,000/unit near the time of condemnation.

The reasonable range, depending on amenities, that Patterson identified for his thoroughly bid architectural and engineering plans presented at trial, lay within this range. at $50,000/unit to $75,000/unit, in five-story precast concrete buildings achieving the full zoned density with required parking, open space, side yards, etc. ***The share attributable to land of the project cost at 10% would yield a reasonable range of $5,000 to $7,500/ unit or at 20%, $10,000 to $15,000/ unit.*** The higher end of the percent range is appropriate given the excellent location on the immediate edge of the Beadle Research Center.

Based on the type of estimates that investors make, the verdict clearly does not indemnify Patterson for his loss. The jury verdict of $1,900/unit is only 3% of a $60,000 unit. The fact that the jury verdict was within the range of testimony is only because the testimony used sales that did not reflect "market value."

b. Another method yielding a lower bound on value is to capitalize any rental increment attributable solely to the situs value of the land. Mr. Hassebrook, Patterson's first licensed real estate appraiser did a study of rents in the Lincoln area and found that proximity to the University campus increased rents approximately $100/month. Using that rental data, he would have testified to the value of Patterson's land using the income method.

Figuring that rental raises factor out the inflation rate, and assigning 4% for the real rate and 6% for the risk rate, we discount conservatively 11 months situs increment a year at 4% + 6% = 10% resulting in ***$11,000 in "net present value"/unit inherent solely in the situs characteristic of the land.*** (For a more thorough explanation of this method see 'Location' under 'Summary of Error Types Cited' in Appendix B.)

c. ***Lower bounds*** can also be determined from sales, even though the sales are inferior to the condemned property. Using three recent sales presented at trial:

1. The fifth and sixth of six 50' wide lot purchases on the only other land assembly sequence done in the 1980's in the neighborhood, terminating in 1989, prior to buildable interest rates, were separately concluded with unadjusted acquisition costs of $5,500/unit and $7,300/unit, respectively, in an inferior location three blocks further east of the campus. Taken by themselves, each may serve as one of several unrelated lower bounds on per unit value. Taken together, time value of money discounting techniques may be used to show that each was part of a single extended property acquisition sequence where the buyer's target price for the time of buildability was about $7,000. (Time sequence sale analysis is covered in Appendix B under "Purchase Price Not Discounted to Time of Buildability.")

2. The Claremont sale, a "special permit" parcel, sold at $4,000/unit was a mile northwest of the campus across rail yards and backed up against a creek with distinct odor. Zoning allowed only two stories, as opposed to the five stories allowed on the R6 zoning on Patterson' land.

III. When the Landowner In An Urban Development Condemnation Is Not Made Whole, He Is No Longer in a Position to Reinvest In Equivalent Property, His Wealth Is Redistributed To Special Interest Groups, And His Constitutional Guarantee of Just Compensation Has Been Denied

The power of eminent domain should not make some men poor, and redistribute the wealth of the politically powerless to politically powerful "rent-seekers." The prosperity of our society depends upon hard work and investment, and upon the example set when those engaging in it are visibly rewarded by the fruits of their labors. By guaranteeing people a fair price for land taken, we encourage work, saving, and investment "by providing security for the fruits of economic endeavors." Frank I. Michelman, *Takings*, 1987, 88 Colum. L. Rev. 1600, 1625-29 (1988).

If a man spends 18 years of arduous work in a well-planned investment strategy setting up the land and technological infrastructure for a job-producing, high bandwidth communications and computing oriented, office residential-technology development in the inner city, just compensation should be ***actual value*** for the highest available and most profitable use for which it was adaptable at the time of taking. To make it otherwise is to reward hard work with poverty, in the most public possible way.

The administration of just compensation by the courts has come under criticism by some commentators because it does not award "consequential" damages. The greater evil, however, is that the landowners in eminent domain actions are not being fairly compensated for their property. The redistribution of land in America, particularly following urban renewal projects is great, and the increasing poverty in America is attributable, in part, to this redistribution of land. Charles C. Geisler, *Land and Poverty in the United States: Insights and Oversights*, 71 Land Economics (1995).

It sometimes happens that private plans conflict with the plans of urban developers, who may utilize the land in a different and decidedly less valuable way than the condemned landowner. Most commonly there are beneficiaries of the "taking," which seldom include the individuals who have "been taken," since they are seldom the chosen developer, architectural

firm, or real estate agent that secures profits from the government action. "Just compensation" leaves the landowner without adequate resources. Whether she be a resident or investor, she is left in the situation where she cannot replace the property because she does not have the "cash" to purchase equivalent property. This kind of situation violates the basic equitable principles of the Just Compensation Clause, which is to indemnify the landowner. It is manifest injustice.

It should be of no surprise if private investment in inner cities disappears, or can be accomplished only with significant government subsidies. The risk of condemnation will chill, if not quell private investment. The United States is not operating under the burden of excess private savings and investment, particularly in its inner cities (such as the condemnation in this case). Fears that adequate compensation will hedge risky investments is not realistic. *See, e.g.*, William K. Jones, *Confiscation: A Rationale of The Law of Takings*, 24 Hofstra Law Rev 1, (1995) 1-12.

Bureaucrats may seek to increase the number of projects in their portfolios even though funds are insufficient to cover all of their plans. In that case, they are presented with the choice of confiscation of private wealth, often from the poor in the name of the poor, or finding more efficient ways to utilize funds. The Luedke report (E20) gave the City of Lincoln a choice, and the City of Lincoln chose delayed confiscation from a private land assembler rather than the course of assembling the property on their own. One of the purposes of just compensation is to redistribute the economic loss so that it will fall upon the public rather than upon those who "happen to lie in the path of the project." *Willow River Co.*, 342 U.S. at 502.

IV. The Nebraska Supreme Court Ruling Is Wrong

The Supreme Court's ruling is wrong. The "comparables" used by the City's appraisers, were too dissimilar to determine "market value" and were not properly adjusted to reflect fair market value at the time of taking. In the Nebraska Supreme

Court opinion, it was stated that the City of Lincoln's first appraiser, Mr. Frost, adjusted the sales to comply with standard appraisal practice. He did not. Mr. Frost readily admitted that he did not adjust any sales, for either time, location, improper, zoning, density, even if they were not arm's lengths transactions. (240:2; E22) This is an error of law and an error of fact.

Comparable sales, as a matter of law, must be comparable. Sales are not comparable just because the condemnor's appraiser says they are. When sales cannot determine market value, the landowner is not indemnified, it is manifest injustice, and other measures of value must be used. That is a well-established principle. *Miller*, 317 U.S. at 369; *Olson*, 292 U.S. at 246. The court erred in admitting evidence based on comparables that were not ***in fact*** comparable. The court erred in not allowing Mr. Patterson and his real estate appraisers to testify to the value of the condemned land using the income method. The ruling is inconsistent with the principles elucidated by the United States Supreme Court, the modern approach to valuation used by investors and appraisers, and modern evidence rules.

The court made a substantial factual error by stating that the condemnor's appraisers properly adjusted the sales distant in time, location, zoning, and other matters. The sales were not properly adjusted. (E22, E37) The best evidence of value using comparable sales, are those closest to the time of taking. *United States v. 100 Acres of Land*, 468 F.2d 1261, 1265 (1972), *cert. denied*, 414 U.S. 864 (1973). It is always possible to find numerous sales of land if the sales need not be "true comparables." The appraisers omitted sales that demonstrated an increase in market value. Mr. Wilson admitted that he omitted using the sales closest in time to the taking because his market research in the subject neighborhood was done prior to these sales being filed. (322:7-13)

These errors deprived Patterson of his constitutional right to just compensation. The jury verdict of $1900/unit was manifestly unjust because the compensation was distinctly lower

than actual value. Patterson was not put in the same position financially as he was before the taking. He was not made whole, in any sense of the word.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

R. Kent Radke
Counsel of Record
The Apothecary
Suite 150
140 North 8th Street
Lincoln, Nebraska 68508
(402) 476-6585

Supreme Court, U.S.
FILED

96 704 SEP 26 1996

OFFICE OF THE CLERK

(2)

APPENDIX

No. _____

The

Supreme Court of the United States
October Term, 1995

Edward H. Patterson and Barbara Morley, Husband and Wife
and American Central City, Inc., A Nebraska Corporation,
Petitioners

v.

City of Lincoln. Nebraska, A Municipal Corporation,
Respondents

On Petition for Writ of Certiorari
To The Supreme Court of Nebraska

PETITION FOR WRIT OF CERTIORARI

R. Kent Radke,
Counsel of Record
The Apothecary
Suite 150
140 North 8th St.
Lincoln, Nebraska 68508
402-476-6585

33 pp

APPENDIX A

Edward H. Patterson and Barbara Morley, husband and wife, and American Central City, Inc., Appellants, v. City of Lincoln, Nebraska, a municipal corporation, Appellee

No. S-94-697

SUPREME COURT OF NEBRASKA

250 Neb. 382

June 28, 1996, Filed

PRIOR HISTORY:

Appeal form the District Court for Lancaster County: Jeffre Cheuvront, Judge

DISPOSITION: AFFIRMED

HEADNOTES:

1. **Verdicts: Juries: Appeal and Error.** A jury verdict will not be set aside unless clearly wrong, and it is sufficient if any competent evidence is presented to the jury upon which it could find for the successful party.

2. **Verdicts: Appeal and Error.** In determining the sufficiency of the evidence to sustain a verdict in a civil case, an appellate court considers the evidence most favorably to the successful party and resolves evidential conflicts in favor of such party, who is entitled to every reasonable inference deducible from the evidence.

3. **Verdicts: Appeal and Error.** Where the evidence is conflicting, an appellate court will not ordinarily interfere with the verdict of the jury unless it is clearly wrong.

4. **Verdicts: Appeal and Error.** A civil verdict will not be set aside where evidence is in conflict or where reasonable minds

may reach different conclusions or inferences, as it is within the jury's province to decide issues of fact.

5. **Trial: Eminent Domain: Evidence.** In eminent domain proceedings where the sales prices of other tracts are offered as evidence of market value of the tract taken, a wide discretion must be granted the trial judge in determining the admissibility of the evidence of the other sales. The evidence should not be admitted where there is a marked difference in the situations of the properties.

6. **Eminent Domain: Evidence.** Whether the properties the subject of other sales are sufficiently similar to the property condemned to have some bearing on the value under consideration, and to be of any aid to the jury, must necessarily rest largely in the discretion of the trial court, which will not be interfered with unless abused. The exact limits, either of similarity or difference, or of nearness or remoteness in point of time, depend upon the location and character of the properties and the circumstances of the case.

7. **Eminent Domain: Evidence.** Generally, evidence as to the sale of comparable property is admissible as evidence of market value, provided there is adequate foundation to show the evidence is material and relevant. The foundation evidence should show the time of the sale, the similarity or dissimilarity of market conditions, the circumstances surrounding the sale, and other relevant factors affecting the market conditions at the time.

8. **Eminent Domain: Expert Witnesses.** An expert witness, when properly qualified, may testify as to the valuation of the property, and the weight and credibility of what the witness considers in coming to his conclusion is for the jury to determine.

COUNSEL: R. Kent Radke, for appellants.

William F. Austin, Lincoln City Attorney, and Dana W. Roper for appellee.

JUDGES: White, CJ, Caporale, Fahrnbruch, Lanphier, Wright, Connolly, and Gerrard, JJ

OPINION: LANPHIER

The City of Lincoln, appellee, separately condemned two pieces of land owned by appellant American Central City, Inc., a Nebraska corporation. Appellant Barbara Morley is the wife of appellant Edward H. Patterson, who is president and sole stockholder of American Central City (hereafter all appellants will be referred to as "Patterson"). The court appointed two sets of appraisers, who awarded $569,812.36 and $25,952.52 for the two pieces of land. The parties appealed, and the cases were consolidated for trial. A jury trial was held, and the jury returned a verdict in favor of Patterson in the amount of $424,270. Patterson appealed, assigning as error (1) that the verdict was not supported by the evidence, (2) that the court erred by excluding valuation determined by an "income or development cost approach" based on anticipated income from apartments Patterson expected to build on the land, and, (3) that the court erred by allowing testimony by the city's witnesses which was not the proper measures of damages. We removed the case from the Court of Appeals' docket pursuant to our power to regulate the caseloads of lower courts. We affirm.

BACKGROUND

The City of Lincoln, under eminent domain, condemned Patterson's land on the stipulated date of May 25, 1990. The land was by resolution labeled as being blighted. Patterson acquired the land over a period of 18 years. At the time of taking, the land was zoned R-6, allowing a maximum of 218 apartment units on the property, but it was not developed.

At trial, several appraisers testified as to the value of the property. All testified that the highest and best use of the land at the date of taking would be to build apartment complexes on it.

Edward Patterson testified that the fair market value of the land was $2,180,000. In an offer of proof, after the city objected, Edward Patterson stated that his opinion of value based on the income or development cost valuation would be $4,470,330. The objections before and after the offer of proof were sustained.

Patterson's first expert stated that the fair market value of the land, using the comparable sales approach, was $872,000. He used 10 sales from 1987 to 1990. Patterson's second expert also stated that the fair market value was $872,000. He used Patterson's first experts report. Neither expert was allowed, after objection, to testify as to the income or development cost valuation, that is, the value based on the income from apartments which Patterson expected to build on the land.

The city's first expert stated that the fair market value of the land, using the comparable sales approach, was $381,500. He used 21 sales from 1981 to 1990. He adjusted for the differences between the comparable properties and the condemned property and also adjusted for differences between market conditions at the time of the comparable sales and those existing at the time of the condemnation. Prior to this opinion, during a foundational examination, Patterson stated: "Your Honor, I would object to the witness giving testimony of value based on the fact he is not using the proper measures of damages." The objection was overruled. When the opinion was actually stated, Patterson raised no objection.

The city's second expert stated that the fair market value of the land, using the comparable sales approach, was $325,000. He used approximately 20 sales from various dates. He adjusted each comparable sale to minimize the differences between it and the condemned property. He explained each adjustment. He also, where he thought it appropriate, adjusted each comparable sale price to simulate the market conditions at the time of condemnation of Patterson's property. These adjustments were explained. Patterson objected to this expert's valuation opinion, stating: "Your Honor, I object. Expressing an opinion based on the fact, that's using improper measure of damages." The objection was overruled. Both of the city's experts stated that the income or development cost valuation was improper when no structure existed on the premises.

ASSIGNMENTS OF ERROR

Patterson assigns as error:

1. That the verdict of the jury is contrary to law and not supported by the evidence in that the jury failed to find that the fair market value of the land taken by condemnation at time of taking was not in excess of Four Hundred Twenty-four Thousand Two Hundred Seventy Dollars ($424,270.00).

2. That the Court erred by not allowing Appellant to present expert testimony and evidence as to the fair market value of the subject property as of the date of taking, based upon an income and development cost approach to valuation.

3. That the Court erred by allowing testimony, duly objected to by the Appellant, in so far as the expert testimony of the Defendant's witnesses, Frank Frost and Matthew J. Wilson, regarding evidence of fair market value of the subject property as of the date of the taking, in that the testimony of said expert witnesses was not the property measures of damages.

STANDARD OF REVIEW

A jury verdict will not be set aside unless clearly wrong, and it is sufficient if any competent evidence is presented to the jury upon which it could find for the successful party. *Solar Motors v. First Nat. Bank of Chadron*, 249 Neb. 758, 545 N.W.2d 714 (1996); *ConAgra, Inc. v. Bartlett Partnership*, 248 Neb. 933, 540 N.W. 2d 333 (1995); *Hoeft v. Five Points Bank*, 248 Neb. 772, 539 N.W. 2d 637 (1995).

In determining the sufficiency of the evidence to sustain a verdict in a civil case, an appellate court considers the evidence most favorably to the successful party and resolves evidential conflicts in favor of such party, who is entitled to every reasonable inference deducible from the evidence. *Solar Motors*, supra; *Roberts v. Weber & Sons*, Co., 248 Neb. 243, 533 N.W. 2d 644 (1995); *Holman v. Papio-Missouri River Nat. Resources Dist.*, 246 Neb. 787, 523 N.W. 2d 510 (1994).

Where the evidence is conflicting, an appellate court will no ordinarily interfere with the verdict of the jury unless it is clearly wrong. *Roberts*, supra; *Lincoln Branch, Inc. v. City of Lincoln*, 245 Neb. 272, 512 N.W.2d 379 (1994).

A civil verdict will not be set aside where evidence is in conflict or where reasonable minds may reach different conclusions or inferences, as it is within the jury's province to decide issues of fact. *Solar Motors*, supra; *Winslow v. Hammer*, 247 Neb. 418, 527 N.W.2d 631 (1995); Terry v. Duff, 246 Neb. 524, 519 N.W.2d 550 (1994).

ANALYSIS

The expert witnesses for both the city and Patterson used the comparable sales approach to estimate the fair market value of the condemned land. Patterson then attempted to use the income or development cost approach. This would base the value of the land on anticipated income from apartments expected to be build on the land. Patterson argues that such an approach was approved in *Iske v Metropolitan Utilities Dist.*, 183 Neb. 34, 157 N.W.2d 887 (1968).

In *Iske v. Metropolitan Utilities Dist.*, the condemned land had a gravel deposit and was subject to a lease to remove and sell the gravel. The parties stipulated that there were no comparable sales for this land. That being true, the trial court allowed the plaintiff's expert in the action to testify as to the income which would be produced form the removal of the gravel and the recreational use of the lake which the removal would create. This court affirmed the use of the "income approach" in that situation.

The case of I*ske v. Metropolitan Utilities Dist.* was followed 2 years later by the case of Iske v. Omaha Public Power Dist., 185 Neb. 774, 178 N.W.2d 633 (1970). This court allowed the use of the income approach in that case involving almost identical land. Again, the parties conceded that no comparable sales existed. The income approach determining valuation from recreational use of the land, in both of the Iske cases was possible because the value derived from the "intrinsic nature" of the land.

This case is different from both of the *Iske* cases. Here, comparable sales were not only available, but Patterson's experts relied on comparable sales for their own valuations. Further, Patterson failed to prove that the land had any intrinsic value, such as recreational use, as compared to the land in either of the Iske cases. We find the exclusion was proper.

Patterson further assigns as error failure to exclude the testimony of the city's expert using the comparable sales approach. Both sides' experts witnesses used the comparable sales valuation approach.

We have stated that in eminent domain proceedings, where the sales prices of other tracts are offered as evidence of market value of the tract taken, a wide discretion must be granted the trial judge in determining the admissibility of the evidence of the other sales. The evidence should not be admitted where there is a marked difference in the situations of the properties. *McArthur v. Papio-Missouri River NRD*, ante p. 96, 547 N.W. 2d 716 (1996); *Thacker v. State*, 193 Neb. 817, 229 N.W.2d 197 (1975). Whether the properties the subject of other sales are sufficiently similar to the property condemned to have some bearing on the value under consideration, and to be of any aid to the jury, must necessarily rest largely in the discretion of the trial court, which will not be interfered with unless abused. The exact limits, either of similarity or difference, or of nearness or remoteness in point of time, depend upon the location and character of the properties and the circumstances of the case. *Langfeld v. Department of Roads*, 213 Neb. 15, 328 N.W.2d 452 (1982).

Generally, evidence as to the sale of comparable property is admissible as evidence of market value, provided there is adequate foundation to show the evidence is material and relevant. The foundation evidence should show the time of sale, the similarity or dissimilarity of market conditions, the circumstances surrounding the sale, and other relevant factors affecting the market conditions at the time. *McArthur*, supra; *Wear v. State of Nebraska*, 215 Neb. 69, 37 N.W.2d 708 (1983).

The testimony of the city's experts met those criteria. It cannot be said that the trial court abused its discretion in allowing the city's witnesses, after satisfying foundation, to testify to comparable sales. Therefore, we find the objections to the city's experts' opinions are without merit.

Regarding whether the verdict was sustained by the evidence, an expert witness, when properly qualified, may testify as to the valuation of the property, and the weight and

credibility of what the witness considers in coming to his conclusion is for the jury to determine. *Iske v. Omaha Public Power Dist.*, supra; *Iske v. Metropolitan Utilities Dist.*, supra.

The jury verdict fell in between the two conflicting sets of expert testimony. The expert witness testimony is not binding on the triers of fact. The amount of damages sustained is peculiarly of a local nature and ordinarily is to be determined by the jury, and this court will not ordinarily interfere with the verdict if it was based upon admissible testimony. When the evidence is conflicting the verdict of the jury will not be set aside unless it is clearly wrong. *Lincoln Branch, Inc. v. City of Lincoln*, 245 Neb. 272, 512 N.W.2d 379 (1994).

We note that the jury had an opportunity to view the property.

From our review of the record, we conclude that the evidence presented a question for the jury and that it is sufficient to sustain the verdict, which is not clearly wrong.

CONCLUSION

Finding that the court did not err in excluding the income or development cost valuation and that sufficient evidence exists to support the jury's verdict, we affirm.

AFFIRMED

APPENDIX B

Analysis of E22
The 'Comparable Sales' of City Expert Witness, Mr. Frank Frost

Pursuant to the Just Compensation clause of the Fifth Amendment as applied to the states through the Fourteenth Amendment, without modern income capitalization techniques there is no way to keep up with the inventiveness of the modern bureaucrat in uncompensated separation of the citizen from his property. The senior appraiser Mr. Wilson was shown at trial to have done 199 of his last 200 appraisals for the City. Mr. Frost, the second appraiser, was represented at trial as having an independent opinion, but in fact he was shown to have presented data that were largely overlapping, adhering to the same closely woven pattern of deception, and in many areas word for word identical to Mr. Wilson's.

The analysis below shows that all of the 'comparables' were defective and of grossly inferior value. No adjustments were made for any of the defects cited here. Further, no adjustments at all from the raw sale price were made by Mr. Frost on any of his 'comparables' despite grossly incomparable conditions. His exhibit summarizing the list of 'comparables' for the jury did not contain sale dates; the dates were elicited on cross-examination. Many of the dates were incorrect and had to be corrected during cross-examination.

No adjustments from the raw sales price were made by Mr. Wilson either except on the one 'comparable' where he overlapped with Frost on Mr. Patterson's parcel acquisitions. His exhibit summarizing the list of comparables for the jury did not contain sales dates, and none had been added when the materials were submitted to the jury for their deliberation as to value.

Both appraisers ignored the fact that elevator style and concrete and steel buildings have been built fully 180° around the City Campus and Downtown area from the Union Pacific railroad bordering the campus at its northeast corner to the same rail line on the on north west. All of their lots were in locations where the appropriate construction was stick built moderate income, three story or less apartments. This Clashes with Mr. Patterson's

location on the edge of the City Campus and Downtown area immediately adjacent to a new $35,000,000+ BioTechnology Center.

Exhibits at trial showed the relation of Mr. Patterson's land to the campus and Downtown area. Mr. Patterson's properties comprised most of the remaining developable land along the 22nd Street eastern border of the University of Nebraska City Campus between 'U' on the north and 'R' on the south. The southern boundary of the campus is 'Q' and almost all academic buildings are south of 'V' (Vine) and east of 10th, with the Union Pacific main line and switch yards forming the north border of the campus. Adjacency to the campus is shown in this document, using the income techniques ruled out by the trial court, to have a value of $11,000 per unit attributable solely to the situs value of the land. Distance from the campus can be determined in almost every case from calculations on the address.

Distances in blocks to addresses listed in the exhibit are apparent simply by subtracting block numbers. Letters get bigger going north and block numbers get bigger going east. Addresses on numbered streets are referenced north and south of 'O' Street. So for example 1431 N. 9th in item #20 is seven blocks north across the rail yards from 'V' and one block west of 10th, and 5601 S. 31st in item #19 is 58 blocks south of 'Q' and 9 blocks east of 22nd.

		Price Per Unit Built or Proposed Buildable
1	1845 "K"	$4,790

Zoned 10 units, R-6. Not adjusted for economies of scale. Not adjusted for being approximately 8 blocks south of Mr. Patterson's University of Nebraska City Campus border location. Purchased by Lincoln School of Commerce for student apartments and parking. Acquired 11-21-85 but not adjusted for

the transient impact of threatened Tax Reform Act of 1986 wiping out tax shelters for outside investor income, and not adjusted for much higher interest rates than those of the recession of 1990; not adjusted for five years of 5% inflation prior to 1990. No indication of whether purchase price was discounted to date of buildability by the buyer.

$4,666

2 9th & "A" $4,666

Zoned 6 units, R-6. 6 units built. Not adjusted for economies of scale. Not adjusted for being approximately 18 blocks south of Mr. Patterson's University of Nebraska City Campus border location. Purchased for 6-plex apartments. Acquired 3-14-86 but not adjusted for the transient impact of Tax Reform Act of 1986 wiping out tax shelters for outside investor income, and not adjusted for much higher interest rates than those of the recession of 1990; not adjusted for four years of 5% inflation prior to 1990. No indication of whether purchase price was discounted to date of buildability by the buyer.

$6,000

3 1124 & "A" $6,000

Zoned 6 units, R-6. 6 units built. Not adjusted for economies of scale. Not adjusted for being approximately 18 blocks south of Mr. Patterson's University of Nebraska City Campus border location. Acquired 5-1-84 but not adjusted for much higher interest rates than those of the recession of 1990; not adjusted for six years of 5% inflation prior to 1990. No indication of whether purchase price was discounted to date of buildability by the buyer.

$4,385

4 919 & "G" $4,385

Zoned 6 units, R-6. Purchased for 6-plex apartments. Not adjusted for economies of scale. Not adjusted for being approximately 11 blocks south of Mr. Patterson's University of Nebraska City Campus border location. Acquired 4-25-85 but not adjusted for the transient impact of threatened Tax Reform Act of 1986 wiping out tax shelters for outside investor income, and not adjusted for much higher interest rates than those of the

recession of 1990; five years of 5% inflation prior to 1990. No indication of whether purchase price was discounted to date of buildability by the buyer.

		$3,985
5	945 "D"	$3,166

Zoned 30 units, R-6. Purchased for 24-plex apartments. Not adjusted for economies of scale. Not adjusted for being approximately 14 blocks south of Mr. Patterson's University of Nebraska City Campus border location. Acquired 1-28-85 but not adjusted for the transient impact of threatened Tax Reform Act of 1986 wiping out tax shelters for outside investor income, and not adjusted for much higher interest rates than those of the recession of 1990; not adjusted for five years of 5% inflation prior to 1990. No indication of whether purchase price was discounted to date of buildability by the buyer.

		$4,500
6	10th & "D"	$3,166

Zoned 51 units, R-6. Purchased for 36-plex apartments. Not adjusted for economies of scale. Not adjusted for being approximately 14 blocks south of Mr. Patterson's University of Nebraska City Campus border location. Acquired 3-11-86 but not adjusted for the transient impact of Tax Reform Act of 1986 wiping out tax shelters for outside investor income, and not adjusted for much higher interest rates than those of the recession of 1990; not adjusted for four years of 5% inflation prior to 1990. No indication of whether purchase price was discounted to date of buildability by the buyer.

		$5,833
7	1617 "F"	$3,166

Zoned 38 units, R-7. Purchased for 30-plex apartments. Not adjusted for economies of scale. Not adjusted for being approximately 12 blocks south of Mr. Patterson's University of Nebraska City Campus border location. Acquired 8-18-81 but not adjusted for much higher interest rates than those of the recession of 1990; not adjusted for nine years of average 5%

inflation prior to 1990. No indication of whether purchase price was discounted to date of buildability by the buyer.

		$3,700
8	1712 "C"	$3,700

Zoned 6 units, R-6. Purchased for 6-plex apartments. Not adjusted for economies of scale. Not adjusted for economies of scale. Not adjusted for being approximately 15 blocks south of Mr. Patterson's University of Nebraska City Campus border location. Acquired 11-83 but not adjusted for much higher interest rates than those of the recession of 1990; not adjusted for seven years of average 5% inflation prior to 1990. No indication of whether purchase price was discounted to date of buildability by the buyer.

		$3,291
9	3280 Holdredge	$2,821

Zoned 17 units (uncorrected mistake of 27 appeared on exhibit submitted to jury), R-6. Purchased for 12-plex apartments. Not adjusted for economies of scale. Not adjusted for being across Holdredge from east campus approximately one mile east and one mile north of Mr. Patterson's University of Nebraska City Campus Location. The East UNL Campus is about two miles east of the UNL City Campus, has only a small fraction of the number of students, no major university athletic events, and no proximity to the Downtown office and entertainment district. Acquired 10-3-88 but not adjusted for the transient impact of Tax Reform Act of 1986 wiping out tax shelters for outside investor income, and not adjusted for much higher interest rates than those of the recession of 1990; not adjusted for two years of average 5% inflation prior to 1990. No indication of whether purchase price was discounted to date of buildability by the buyer.

Non-Built

10 2245 S $1,833

Zoned 18 units, R-6. None built. Not adjusted for economies of scale. Not adjusted for the difference between being purchased in block wide dilapidated strip Patterson was buying before the Beadle Center was announced and the blight clearance power of full Patterson assembly development in coordination with Beadle Center. Acquired 7-88 but not adjusted for the transient impact of Tax Reform Act of 1986 wiping out tax shelters for outside investor income, and not adjusted for much higher interest rates than those of the recession of 1990; not adjusted for two years of average 5% inflation prior to 1990. No indication of whether purchase price was discounted to date of buildability by the buyer.

None-Built

11 2256 "S" $2,500

Zoned 6 units, R-6. None built. Not adjusted for economies of scale. Not adjusted for the blight clearance power of full Patterson assembly development in coordination with Beadle Center. Acquired 11-18-87 but not adjusted for the transient impact of Tax Reform Act of 1986 wiping out tax shelters for outside investor income, and not adjusted for much higher interest rates than those of the recession of 1990; not adjusted for three years of average 5% inflation prior to 1990. No indication of whether purchase price was discounted to date of buildability by the buyer.

None-Built

12 2222 "T" $2,333

Zoned 6 units, R-6. None built. Not adjusted for economies of scale. Not adjusted for the difference between being purchased in block wide dilapidated strip Patterson was buying before the Beadle Center was announced and the blight clearance power of full Patterson assembly development in coordination with Beadle Center. Acquired 4-29-88 but not adjusted for the transient impact of Tax Reform Act of 1986 wiping out tax shelters for outside investor income, and not

adjusted for much higher interest rates than those of the recession of 1990; not adjusted for two years of average 5% inflation prior to 1990. No indication of whether purchase price was discounted to date of buildability by the buyer.

		$2,291
13	SWC 23rd & "T"	$1,718

Zoned 32 units, R-6. 24 built. Not adjusted for economies of scale. Not adjusted for the difference between being purchased in block wide dilapidated strip Patterson was buying before the Beadle Center was announced and the blight clearance power of full Patterson assembly development in coordination with Beadle Center. Acquired 6-11-84 by the construction company that eventually was awarded Patterson's land by the Urban Development Department. The buyer placed the same three-story "cookie cutter" 24-plex on this parcel that he had built four times previously in the neighborhood east of this site, with little investment in the plans; not adjusted for much higher interest rates than those of the recession of 1990; not adjusted for six years of average 5% inflation prior to 1990. No indication of whether purchase price was discounted to date of buildability by the buyer.

		$1,506
14	2900 North 1st	$1,506

Zoned 60 units R-2. 60 built. Not adjusted for economies of scale. Not adjusted for being approximately 19 blocks north of 'Y' across rail yards and Cornhusker Highway, and nine blocks west of the 10th street side of the UNL City Campus, the newer eastern border of which was Patterson's location. Subject site is immediately west across North 1st from the largest trailer park in Nebraska; the trailers stretch both to the north of, and far to the south of subject property. On the east side of North 1st, forming the southern border of subject property, is another expanse of trailer houses covering many city blocks. The site bares no relationship to the Campus, or to the Downtown office and financial district. The area is completely built out with no likelihood of any change of use in the surroundings for decades. By itself the project has no hope of defining the surroundings.

Acquired 8-10-89 but not adjusted for much higher interest rates than those of the recession of 1990; Expensive site work noted by Mr. Frost. R-2 zoning limited to 35' instead of the 45' in the R-6 zoning enjoyed by the Patterson assembly, thus limiting security and views that can be offered to tenants. No indication of whether purchase price was discounted to date of buildability by the buyer.

		$884
15	1824 "M"	$430

Zoned 142 units, R-8. 69 built. Not adjusted for economies of scale. Not adjusted for being approximately 5 blocks south of Mr. Patterson's University of Nebraska City Campus border location. Acquired 5-24-90, interest rates dropping. Area where it has been common to spend $50,000 to purchase a house, then pay $6,000 to demolish (1990 dollars) it in preparation for a 'slip-in' 5 or 6-plex. On cross-examination, Mr. Frost admitted that this was a misrepresented conveyance of a partial interest in the property, the comparable was allowed to stay unmodified on the list that went to the jury. Adding insult to injury the exhibit that the jury got had $40/unit for the price per unit buildable rather than the $430/unit buildable that the misrepresented partial interest actually cost. Even if all the partial interests in the land had been totaled the sale still would in not have been representative of a 'market' in land because of the encumbrances each partial ownership represented to the other. ***The seriously out of line nature of these figures and the fact that they made it through the court system unscathed, over the vigorous objections of the condemnee, calls into question the integrity of the 'comparable' based appraisal process.*** No indication of whether purchase prices were discounted to date of buildability by the buyer.

		$1,648
16	4607 Old Cheyenne Road	$1,648

Zoned 182 units, R-3; 182 units built. Not adjusted for economies of scale. Not adjusted for being approximately 60 blocks south and two miles east of Mr. Patterson's University of Nebraska City Campus border location. Acquired 9-18-89; interest rates beginning to drop. 182 units built by non-arms length negotiated Special Permit on otherwise incompatible site,

obtained from same departments preparing the case for this condemnation. R-3 zoning limited to 35' instead of the 45' in R-6 enjoyed by Patterson assembly, limiting security and views that can be offered to tenants. No indication of whether purchase price was discounted to date of buildability by the buyer.

17&18 5011 Vine & 52nd & Vine $2,832

Zoned 406 units, R-3. 406 units built. Not adjusted for being approximately 30 blocks east of Mr. Patterson's University of Nebraska City Campus border location. Acquired 9-(12&19)-89, interest rates beginning to drop. 406 units built by non-arms length negotiated Special Permit on otherwise incompatible site, obtained from same departments preparing the case for this condemnation. R-3 zoning limited to 35' instead of 45' in R-6 enjoyed by Patterson assembly. This limits security and views that can be offered to tenants. No indication of whether purchase price was discounted to date of buildability by the buyer.

$2,000

19 5601 S. 31st $2,000

Zoned 132 units, R-2. 132 units built. Not adjusted for being approximately 58 blocks south a mile east of Mr. Patterson's University of Nebraska City Campus border location. Acquired 12-31-90, interest rates beginning to drop. 132 units built by non-arms length negotiated Special Permit on otherwise incompatible site, obtained from same departments preparing the case for this condemnation. Extensive site work noted by city appraiser, which is misleading since typically all that is being done is to bring areas up to grade for slab on grade construction, a process that Patterson's type of construction, allowed by R-6 zoning, needs very little of on a per unit basis. R-2 zoning limited to 35' instead of 45' in R-6 enjoyed by Patterson assembly. This limits security and views that can be offered to tenants. No indication of whether purchase price was discounted to date of buildability by the buyer.

20 1321-1431 N. 9th St. $4,000

Zoned 88 units, R-4. 88 units built. Not adjusted for being approximately one mile northwest of core of campus, in a run

down industrial district between the rail yards and the stench of the flood-prone Salt Creek. By itself it had no hope of defining the surroundings. Acquired 3-27-90, interest rates beginning to drop and development land near campus very scarce, so developers were willing to take anything! We indicate on the record that the buyer was an out-of-state investor who specialized in near campus developments across the United States; 88 units built by non-arms length negotiated Special Permit on otherwise incompatible site, obtained from same departments preparing the case for this condemnation. "All front-end cost paid by seller," was noted on the exhibit taken into jury room. This is an extremely misleading way of saying that the seller was required to bring the Salt Creek Flood Plain site up to the legally required 1' above the floodplain for the type of buildings possible with this zoning. There is no logical way that this expense should be subtracted from what the buyer was willing to pay for the property, the amount subtracted from price was inappropriate, the evidence should not have been submitted to the jury. The R-4 zoning limited the building height to 35' instead of 45' in R-6 enjoyed by Patterson assembly. This limits security and views that can be offered to tenants. No indication of whether purchase price was discounted to date of buildability by the buyer.

21 7101 Van Dorn $2,864

Zoned 112 units, R-3. 112 units built. Appraiser appears to have taken it upon himself to allocate 7.33 acres of a 58 acre sale to these apartments. While this may well be accurate, it is yet another process not easily checked and ripe for abuse. Not adjusted for being approximately 50 blocks east and two miles south of Mr. Patterson's University of Nebraska City Campus border location. Acquired 7-25-89, interest rates beginning to drop. 112 units built by non-arms length negotiated Special Permit on otherwise incompatible site, obtained from same departments preparing the case for this condemnation. R-3 zoning limited to 35' instead of 45' in R-6 enjoyed by Patterson assembly. This limits security and views that can be offered to tenants. No indication of whether purchase price was discounted to date of buildability by the buyer.

Analysis of E39
The 'Comparable Sales' of Mr. Matthew Wilson

1 2523 'Q' $3,333

Zoned 6 units, R-6. Approximately 3 blocks further east of UNL Campus from Mr. Patterson's land on the eastern border. Not adjusted for economies of scale. Purchased by Mrs. O'Shea as the fourth of six 50' wide lots assembled for a half city block apartment development begun in 1990. Appraiser omitted the fifth and sixth purchases done separately in 1989 at $5,500/unit and $7,300/unit respectively. Acquired 8-20-88, with impact of Tax Reform Act of 1986, during high interest rates; two years of 5% inflation prior to 1990. No indication of whether purchase price was discounted to date of buildability by the buyer.

2 2231 'S' $2,500

Zoned 4 units if holding the adjacent Patterson properties but 0 otherwise since, at only 4,610 sq. ft. area by 136' deep, the lot would only be 34' feet wide, less than the minimum buildable parcel width of 50' allowed by the zoning code, R-6. None built. Not adjusted for the fact that to a buyer other than an assembler like Patterson nothing could be done with the parcel but hold it and pay taxes on it. Note residual evidence of 'checkerboard' appraisal technique used by the City appraisers with Wilson getting the black squares and Frost the white squares in Patterson's assembly and appraising their value separately without benefit of assembly. Note that Mr. Wilson who had done 199 of his last 200 appraisals for the city seems to have been the more aggressive of the two in pursuit of the possibilities of checkered boarding since only Wilson has parcels on his list like this which are totally unbuildable when standing alone. Not adjusted for economies of scale. Not adjusted for the difference between being purchased in block wide dilapidated strip Patterson was buying before the Beadle Center was announced and the blight clearance power of full Patterson assembly development in coordination with Beadle Center. Acquired 6-28-88 but not adjusted for the transient impact of Tax Reform Act of 1986 wiping out tax shelters for

outside investor income, and not adjusted for much higher interest rates than those of the recession of 1990; not adjusted for two years of average 5% inflation prior to 1990. No indication of whether purchase price was discounted to date of buildability by the buyer.

3 2222 'T' $2,500

The same as Frost sale #12 ; see analysis above. Adding this one case of overlap to their lists prepared the two appraisers to say that they did not use a strict 'checkerboard' technique with one getting the black squares in Patterson's assembly and one the white. Note the 10% boost over the unadjusted raw sales prices that were used everywhere by Frost and everywhere by Wilson except for this one 'comparable' where they overlapped on Patterson's properties. This boost is an insignificant move toward true value but serves to ward off the charge that the two appraisers, who were represented as having given independent appraisals, in fact did not.

4 2221 'R' $2,000

Zoned 6 units, R-6. None built, but older abandoned house on the property had to either be torn down or massively reconstructed, and no adjustment was made for that. Not adjusted for economies of scale. Not adjusted for being made totally unbuildable and not accessible to assembly by the following factors: land on the east side was owned by government; the next two parcels to the left were at the time prohibitably expensive well maintained homes; being only 50' wide the five feet of fill required to get the foundation one foot above floodplain could not be adequately tapered; and the University had announced that it would someday take the whole area in condemnation for expansion over to the linear park built on the old North East Radial Right of way. This property doesn't deserve further analysis. Like almost all the others it simply needs to be excluded from any type of consideration as a comparable. Note that here again as in #2 above we see an example of Mr. Wilson appearing to have been the more aggressive of the two city appraisers in creating a case for

confiscation by including totally unbuildable 'comparables' in his list.

5 2212 'Q' $1,833

Zoned 6 units, R-6. None built, but older house on the property had to be torn down to make way for the used car lot maintenance service use that the lot was put to. Not adjusted for being made totally unbuildable and not accessible to assembly by the following factors: land on the east side was owned by the Delp used car lot operation which covered the rest of the block down to the corner 23rd and 'Q' streets; in an attempt to force acceptance for their request for rezoning compatible with used car maintenance the house immediately on the east of subject house was maintained by the Delps in a notorious state of disrepute up to and including continuous drug sales by tenants and shooting of a police officer with his own gun on the front porch; being only 50' wide the five feet of fill required to get the foundation one foot above floodplain could not be adequately tapered; This property doesn't deserve further analysis. Like almost all the others it simply needs to be excluded from any type of consideration as a comparable. Note that here again as in #'s 2 and 4 above we see an example of Mr. Wilson appearing to have been the more aggressive of the two city appraisers in creating a case for confiscation by including totally unbuildable 'comparables' in his list.

6 2119 'Q' $2,500

Zoned 6 units, R-6. None built, but tiny two bedroom house on the property with no garage and no driveway is the only single story house on the block, and was close to being demolished for disrepair when it was bought. Not adjusted for being made totally unbuildable and not accessible to assembly by the following factors: two story house on the west side was owned and occupied by upper middle income family who put substantial money into upgrading the property; the next two houses to the east are two story rental properties continuously rented to four or more students each for the years; being only 50' wide the five feet of fill required to get the foundation one foot above floodplain could not be adequately tapered; This property doesn't deserve further analysis. Like almost all the others it simply needs to be excluded from any type of consideration as a

comparable. Note that here again as in #'s 2, 4, and 5 above we see an example of Mr. Wilson appearing to have been the more aggressive of the two city appraisers in creating a case for confiscation by including totally unbuildable 'comparables' in his list.

7 2311-31 'U' $1,500

Zoned 30 units, R-6. None built; unable to get financing for apartments, the buyer did extensive self financed major repair work to reuse two old houses on the property as $700/month+ student rentals. Not adjusted for economies of scale. Parcel negatively impacted on its west end at the time by abandoned house substantially destroyed on the inside but not bad enough for the city to condemn on the outside. Not adjusted for the difference between being purchased next to block wide dilapidated strip Patterson was buying before the Beadle Center was announced and the blight clearance power of full Patterson assembly development in coordination with Beadle Center. Acquired 12-23-87 but not adjusted for the transient impact of Tax Reform Act of 1986 wiping out tax shelters for outside investor income, and not adjusted for much higher interest rates than those of the recession of 1990, so that the heirs attempting to sell the property when owner Emery Blue died had essentially no apartment development market to sell into at the time (Emery Blue, god rest his soul, was not a 'willing seller'); not adjusted for three years of average 5% inflation prior to 1990. No indication of whether purchase price was discounted to date of buildability by the buyer.

$3,137

8 53rd & R $1,951

Zoned 164 units, R-5. 102 units built. Not adjusted for being approximately 30 blocks east of Mr. Patterson's University of Nebraska City Campus border location. Acquired 11-18-87 but not adjusted for the transient impact of Tax Reform Act of 1986 wiping out tax shelters for outside investor income, and not adjusted for much higher interest rates than those of the recession of 1990; not adjusted for three years of average 5% inflation prior to 1990. R-5 zoning limited to 35' instead of 45' in

R-6 enjoyed by Patterson assembly. This limits security and views that can be offered to tenants as well as the number of units that can be put on the lot while still meeting setback and parking requirements. No indication of whether purchase price was discounted to date of buildability by the buyer. Property purchased from National Bank of Commerce Trust and Savings association, an unusual seller disposing of the property at a most inopportune time in the business cycle. While being immediately adjacent to the south end of the 406 unit Lions Gate apartment development appearing as 'special permit' comparable #'s 17 & 18 on Frosts list, Wilson represents the R-5 zoning as a normal part of the area independent of the process which lead to its acquisition by the buyer.

$2,208

9 44th & Leighton $703

Zoned 155 units, R-6. 72 units built. Not adjusted for being north across Leighton street from the crop test plots side of 'Agriculture' Campus approximately one mile east and one mile north of Mr. Patterson's University of Nebraska City Campus Location. The UNL East Campus is about two miles east of the UNL City Campus, has only a small fraction of the number of students, no major university athletic events, and no proximity to the Downtown office and entertainment district. Not adjusted for facing the loading docks and garbage dumpsters on the back side and west end of the University Place strip shoping center. Not adjusted for being across the street on the north side from a city block of single story, single rectangle, single roof ridge, unusually small two bedroom houses. Acquired 9-13-88 but not adjusted for the transient impact of Tax Reform Act of 1986 wiping out tax shelters for outside investor income, and not adjusted for much higher interest rates than those of the recession of 1990; not adjusted for two years of average 5% inflation prior to 1990. No indication of whether purchase price was discounted to date of buildability by the buyer.

		$884
10	1824 'M'	$430

Same as Frost sale #15 except that Wilson's exhibit did not understate the price per units buildable from $430 down to $40 as Frosts did; see analysis above. Note that here, where the two appraisers are not susceptible to the charge of 'checkerboarding' Patterson's properties as described in #3 above, Wilson uses the unadjusted sale price as his estimate of value just as Frost did.

11 1321-1431 N. 9th
Same as Frost sale #20; see analysis above.

12 4607 Old Cheney
Same as Frost sale #16; see analysis above.

13 5011 Vine & 14 52nd & R
Same as Frost sale #17 & 18; see analysis above.

15 2900 N. 1st
Same as Frost sale #14; see analysis above.

Summary of Error Types Cited

- **Location**

No 'comparable' listed is adjusted for location.

Mr. Hassebrook, Patterson's first licensed real estate appraiser presented at trial a study of rents in the Lincoln area and found that proximity to the University campus increased rents approximately $100/month per unit over outlying locations.

In concrete and steel buildings with professional maintenance and an adequate maintenance budget, such as was provided for in Mr. Patterson's development plan described at trial, the net present value of this income stream may be readily approximated as an inflation indexed perpetuity of moderate risk.

The discount rate normally is the sum of the *real rate + risk rate + inflation rate*. Here inflation is approximately canceled out by raises in rent, and the real rate of return on passive investments perennially hovers at or below 4%. Assigning 6% for risk is conservative where little or no additional competition could be built and Congress has already removed tax shelter. Most real estate development models in similar circumstances use risk rates lower than this. That would give a total of 10% for the discount rate. and figuring 11 months rent per year or 8% vacancy rate (again ultra conservative since vacancy is actually 1.5% in this part of Lincoln), the resulting value is ($100 x 11) / 0.10 = ***$11,000 in 'net present value'/unit inherent solely in the situs characteristic of the land.***

Adding this $11,000 situs increment to the typical price per unit value of outlying sites for moderate income apartments, approximated here as $4,000, gives ($11,000 + $4,000) = $15,000 per unit land value which is 21% of a $70,000 moderate income apartment. The reason this percentage is on the higher end of the normal range for land as a share of total development cost is the extreme pressure on demand for apartments in this built out area.

- **Economies of Scale**

The per unit bids that Mr. Patterson received for his fully architected and professionally stamped development plans presented at trial and favorably low financing fees and interest rates proffered by a large scale mortgage broker also described at trial were predicated on having 200+ units built in a single area as part of one project. The management fees and operating expense budget per unit bid by a reputable management firm similarly were based on 200+ units. Construction costs and operating expenses on a per unit basis were at least 15% lower than for comparable amenities in a 6-plex.

This trend toward increasing economy with increasing production run size which is why large complexes exist and holds true in almost every major industry in the world was nevertheless allowed to be stood on its head by the city

appraisers. They picked out a selection of 'comparables' which was purported to prove that land gets cheaper the larger the assembly. Forgetting the experience of the rest of the world in the production of goods and services, if that is true then why do so many developers go to such lengths and sacrifice to assemble land?

In precise mathematical terms what this accomplished over Patterson's objections was to reverse the order of value of Mr. Patterson's assembled land from being greater than the sum of the values of its constituent parts to being less than the sum of the partial values.

- **Blight Clearance**

The old black ghetto, for the 1% of Lincolnites who were segregated unofficially as such, was from 19th Street west to 23rd Street and from R Street north to Vine Street. The area was flooded regularly by Antelope Creek before it was put underground in 1914 and periodically thereafter until the construction of Holmes Lake Dam on Antelope Creek about five miles south of the site in the 1960's. In the mid 1960's the city planned a major federally funded four lane traffic arterial called the North East Radial through the middle third of the ghetto and acquired most of the land needed for it by the mid 1970's. Threatening condemnation but never using it and allowing their acquisitions to fall into an extreme state of disrepair, they caused advanced blight in the Radial Corridor.

Simultaneously, UNL published a major Campus 20 Year Plan in 1967 showing acquisition of the land from the existing campus east over to the Radial for use as recreation fields near the existing campus followed by a large research and development complex to be built along the Radial. Also threatening condemnation but never using it and allowing their acquisitions to fall into an extreme state of disrepair, they extended the radial blight over to the Campus.

Having bought most of the middle third of the old ghetto for the Radial, in the early 1980's the City killed the project and scheduled the land to become a park. By the late 1980's the

park was built and the long planned Beadle Center on the western third of the ghetto was in the early design stages. By the 1990 condemnation the Beadle Center was officially under development, and Patterson was approaching start of construction.

The Patterson development would have cleared away the remaining third of the old Antelope flood plain/ghetto strip. Most of the land had already been cleared in preparation for development even before the condemnation. Allowing the City to appeal to the prejudice of the jury by showing pictures of structures already removed at the time of taking was a gross distortion of the nature of the highest and best use of this land and never should have been allowed to occur.

In the case of all the slip-in lots from other areas, the false comparison that the city purposely set up was that of being stuck tightly between well maintained houses and being stuck tightly between blighted houses inhabited by ghetto dwellers. In actuality the correct comparison would have been that of being stuck tightly at near ground level between structures impacted by having a rental property with no onsite management next door vrs having the high-rise construction, long views, and open spaces allowed by Mr. Patterson's extensive assembly.

In precise mathematical terms, what this accomplished over Patterson's objections was to take the slip-in 'comparables' from being *lower bounds* on the per unit value of Mr. Patterson's property to being *upper bounds*.

It further produced as a consequence a valuation of the 'constituent parts' of Mr. Patterson's assembly as blighted ghetto lots and houses with blighting adjacent property too unsightly to allow construction of nice buildings.

The logical extension of this when put together with the reversal of 'Economies of Scale' described above and the city appraisers' denial of the impact of the passage of time, described under 'Purchase Price Not Discounted to the Time of Buildability' below is:

218 units worth of high rise land being developed within the coming year, adjacent to a newly under development multimillion dollar Biotechnology Center on the edge of a major university City Campus and Downtown office and entertainment center, entirely surrounded by new or well maintained real estate which has been proven in a court of law by the government to be worth less than the sum of the actual purchase prices of several dozen fragmented and largely unbuildable slum lots purchased over a period of eighteen years.

- **Interest Rate**

Interest on debt in large scale residential developments is so large as a percentage of total revenue that rates by themselves have the power to switch large scale residential construction on and off.

No 'comparable' listed by the expert was adjusted for the impact of interest rate cycles.

The amount offered by sophisticated investors for land purchased for such projects is what the land would be worth as part of a completed assembly on the day all factors are ripe for development less site preparation, discounted back to the purchase date using a discount rate which includes a fairly high risk component.

The interest rate which is controlled by the interaction of money markets with the open market operations of the Federal Reserve Board is normally taken down every time there is a recession in order to stimulate recovery. Developers live for these periods of low interest rates. Because the recession of the late 1970's and early 80's was accompanied by high inflation or 'stagflation,' interest rates could not be taken down as usual. This was followed during

the Reagan years by the longest period in modern history without a recession, and consequently no Fed lowering of interest rates to stimulatory levels. When the recession of 1990 arrived everyone including Mr. Patterson and the Urban Development Department (condemner) had been waiting for a decade for the one they missed in 1980.

- **Inflation.**

  Sales dated as far back as 1981 in the case of sale #7 were included in the 'comparables'. Department of Commerce data show inflation stayed close to an apparent Fed target of 5% per year.

  No 'comparable' listed by the expert was adjusted for inflation.

- **Tax Reform Act of 1986**

  The Tax Reform Act of 1986 temporarily depressed return on investment in income property, and consequently the land it is built on, by removing the shelter of income outside the project with accelerated depreciation paper losses. This was anticipated a year before the law went into effect and dampened demand for land for several years afterward by contributing to a temporary halt in construction of new apartments. The scarcity of new apartments in an area of 1.5% vacancy and increasing population in turn drove up the rents to the point where return on investment necessary for new construction was reached again in 1990.

  No 'comparable' listed was adjusted for the transient impact of the tax reform act of 1986.

- **Non Arms Length Transactions**

  Sales 16 through 21 were by non-arms length negotiated Special Permit on otherwise incompatible sites, obtained

from the same departments preparing the case for this condemnation, within a year of its occurrence.

No 'comparable' listed by the expert was adjusted for the impact of non arms length dealing.

Special permit land sales are bogus 'comparables' because the sales are not subject to free-market economic conditions.

- **Undivided Partial Interests**

Mr. Frost was forced to admit, on cross examination, that sale 15 was a ***misrepresented*** conveyance of a ***partial interest*** in the property.

No 'comparable' listed was adjusted for undivided partial interests.

As noted above this was in an area where it has been common to spend $45,000 to purchase a house, then pay $6,000 to demolish (1990 dollars) it in preparation for a 'slip-in' 6-plex, that is to spend $8,500 per unit for land with no views, and typically obnoxious surroundings, with no hope of the development itself transforming them.

- **Purchase Price Not Discounted to the Time of Buildability**

The purchaser of land for development must hold the land, waiting until conditions have arrived making the appropriate development buildable. These conditions for buildability typically include occurrence of a solid trend toward low interest rates such as in the recession of 1990, adjustment of the rental or sales market to transient conditions such as the Tax Reform Act of 1986, solidification of predicted development on the boundary such as a major university research center, and successful acquisition of related parcels, easements, special permits, etc. Having estimated the wait until conditions for buildability arrive, the would-be developer estimates what the land will be worth to her in inflated future dollars when it becomes buildable, net of

demolition and other costs. She sets a target acquisition cost at or below this, and discounts that value back to the purchase date. The estimated future target acquisition price is divided by a ***discount factor*** = (1 + discount rate)^n where n is the number of ***years wait*** required, and the discount rate is the usual sum of real rate at 4%, and inflation rate at 5%, but risk is much higher at about 11% for an approximate total of 20%.

Years Wait	Discount Factor
1	1.20
2	1.44
3	1.73
4	2.07
5	2.49
6	2.99
7	3.58
8	4.30
9	5.16
10	6.19

Reversing the perspective, one is able to look backward from a successful land assembly and development to see how astutely the buyer and seller predicted conditions for buildability. Suppose for example that assembly of six houses, on roughly equal 50' wide lots for redevelopment of a full half city block had progressed to the point of owning 3 houses by 1986, and that the developer in 1990 was actually able to develop the fully assembled block with good recessionary interest rates, purchasing the last property right before start of development at $7,000 per unit. If she predicted the future perfectly in 1986 she would have been willing to pay $7,000/2.07 = $3,381 per unit if a fourth house became available. If in 1989 she purchased the second to last house giving herself a year for acquisition of the last one, and for interest rates to develop a strong downward trend, she would have been willing to pay $7,000/1.2 = $5,833 per unit. Having only the last house to go she would now be willing to pay her full $7,000/unit target price for it

any time in 1989 after sensing that conditions were right for a recession and low interest rates in the near future.

So the 'holdout' theory of discarding progressively higher prices toward the end of an extended assembly is wrong. 'Holdouts' do occur, but usually the owner of the last house purchased has already suffered the loss consequences of holding out for a decade or more in an underutilized asset, and is looking forward to putting his capital to more productive uses. If the buyer and seller are on good terms, the seller has everything to gain and nothing to loose by selling at this figure.

The buyer's target price at the time of buildability, $7,000/unit in this example, is well above the market value of the house in the single family home market, and above the net present value of the property used as a rental. Since, under Lincoln zoning regulations, the seller's land supports 10 units if used as part of the half city block development, but only 5 if used for a 'slip-in' apartment building on a 50' wide lot, it is also far above the total compensation he would receive for use in 'slip-in' fashion.

In any event, note that tearing down a house on a 50' wide lot to build only five units puts the land cost per unit at 1/5 the price of a single family home plus demolition and sales commissions. This puts the land cost at or above the 10% to 20% of total development cost cited earlier as a reasonable rule of thumb for apartment land value in densely built out, high demand areas on the date of buildability, thereby shutting off the market.

Nor is there a 'market' the seller can turn to in the surrounding town for his house as one sixth of the land for an apartment complex on this specific half block the rest of which is not for sale.

Nor do land assemblies in general constitute a 'market' for land. So even the assembler's final target price is almost always well below the net present value of the land once conditions of buildability have been reached. So it can serve as a lower bound on value, but almost never as an accurate approximation of value.

FILED
DEC 4 1996
CLERK

(3)

No. 96-704

In The

Supreme Court of the United States

October Term, 1996

Edward H. Patterson and Barbara Morley, Husband and Wife and American Central City, Inc., a Nebraska Corporation,
Petitioners,

v.

City of Lincoln, Nebraska, a Municipal Corporation,
Respondent.

On Petition for Writ of Certiorari
To The Supreme Court of Nebraska

RESPONDENT'S BRIEF IN OPPOSITION

Dana William Roper
Counsel of Record
City Attorney's Office
City of Lincoln, Nebraska
555 South 10th Street
Lincoln, Nebraska 68508
(402) 441-7290

15 pp

QUESTIONS PRESENTED

Whether a jury verdict within the range of evidence should be upheld.

Whether the weight and credibility of the testimony of lay and expert witnesses upon issues of valuation and damages are peculiarly of a local nature and ordinarily to be determined by the jury.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF JURISDICTION 1

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT

I. This Court has no jurisdiction to consider the Petitioners' arguments 2

SUBSTANTIAL FEDERAL QUESTION 4

II. The decision of the Nebraska Supreme Court excluding hypothetical income is consistent with the general rule 6

CONCLUSION 9

TABLE OF AUTHORITIES CITED

Page

Beck v. Washington, 369 U.S. 541 (1962) 3

Crowell v. Randell, 10 Pet. 368 (1836) 3

Hill v. California, 401 U.S. 797 (1971) 3

Iske v. Metropolitan Utilities Dist. of Omaha, 183 Neb. 34, 157 N.W.2d 887 (1968) 5

Jensen v. State Dep't of Roads, 184 Neb. 802, 172 N.W.2d 607 (1969) 5

Levitin v. State of New York, 12 A.D.2d 6, 207 N.Y.S.2d 798 (N.Y. App. Div. 1069), *reargument denied, Levitin v. State of New York*, 13 A.D.2d 611, 214 N.Y.S.2d 712 (N.Y. App. Div. 1961) 6

McGoldrick v. Compagnie Generale, 309 U.S. 430 (1940) 3

Mononagahela Navigation Co. v. United States, 148 U.S. 312, 326 (1893) 10

New York Central & H.R. Co. v. New York, 186 U.S. 269 (1902) 3

Oregon v. Kennedy, 456 U.S. 667 (1982) 4

Patterson v. City of Lincoln, 550 N.W.2d 650 (Neb. 1996) 2

State Dep't of Roads v. Dillon, 175 Neb. 444, 122 N.W.2d 223 (1963) 4, 5

State by Comm'r of Transp. v. Mehlman, 118 N.J. Super. 587, 289 A.2d 539 (App. Div. 1972) 8

Street v. New York, 394 U.S. 576 (1969) 4

Tandet v. Urban Redevelopment Commission, Etc., 179 Conn. 293, 426 A.2d 280 (1979) 7, 8

U.S. v. 1.16 Acres, etc., City of Stamford, Conn., 300 F.Supp. 1021 (D. Conn. 1969) 8, 9

Washington v. Chrisman, 455 U.S. 1 (1982) 4

Yee v. City of Escondido, 403 U.S. 419 (1992) 2

Zwygart v. State of Neb. Dep't of Roads, 230 Neb. 128, 430 N.W.2d 301 (1988) 6

MISCELLANEOUS

Neb. Constitution art. I, § 21 3

4 *Nichols on Eminent Domain*, § 12B.09[3] (3d ed. rev. 1994) 6, 7

Supreme Court Rule 15.1 2

28 U.S.C. § 1257 . . . . . 1, 3, 4

STATEMENT OF JURISDICTION

This Court cannot properly exercise jurisdiction over this case pursuant to 28 U.S.C. § 1257(a). The question of the Fifth and Fourteenth Amendments to the United States Constitution were never presented or argued to the Nebraska courts.

STATEMENT OF THE CASE

This case involves land that was condemned in connection with a redevelopment project which had the multiple goals of establishing a boundary for the University of Nebraska, developing a park, and reintroducing residential property into the neighborhood. The Petitioners' appraisers placed the value of the taking at $872,000.00, while the property owners' opinion of value was $2,180,000.00. The Respondent's first appraiser placed the taking at $381,500.00, while a second appraiser for the Respondent placed the value at $325,000.00. The jury returned a verdict of $424,270.00. In their assignment of errors to the Nebraska Supreme Court, the Petitioners alleged:

> (1) That the verdict of jury is contrary to law and not supported by the evidence in that the jury failed to find that the fair market value of the land taken by condemnation at time of taking was not in excess of $424,270.00 (four hundred twenty-four thousand two hundred seventy dollars).
>
> (2) That the Court erred by not allowing Appellant to present expert testimony and evidence as to the fair market value of the subject property as of the date of taking, based upon an income and development cost approach to valuation.
>
> (3) That the Court erred by allowing testimony, duly objected to by the Appellant, insofar as the

> expert testimony of the Defendant's witnesses, Frank Frost and Matthew J. Wilson, regarding evidence of fair market value of the subject property as of the date of taking, in the testimony of said expert witness was not the proper measures of damages.

Patterson v. City of Lincoln, 550 N.W.2d 650, 653 (Neb. 1996).

Pursuant to United States Supreme Court Rule 15.1, the Respondent brings the following misstatements of facts contained in the Appendix to the Court's attention. The Petitioners in what has been labeled Appendix B, attempt a post-trial analysis of two exhibits marked "E22" and "E39" which set out the comparable sales used by the Respondent's experts. This "analysis" contains facts that were never proven or introduced at trial and distorts other facts. For example, on page 24 of the Appendix, the Petitioners state no "comparable" listed is adjusted for location. The Petitioners conveniently ignore that the comparables used by the City came from the immediate neighborhood of the Petitioners, including some of the property condemned by the Respondent, and no adjustment was necessary. By and large, Appendix B misrepresents to this Court the facts proven at trial.

REASONS FOR DENYING THE WRIT

I.

THIS COURT HAS NO JURISDICTION TO CONSIDER THE PETITIONERS' ARGUMENTS.

This Court refuses to review judgments rendered by the highest court of a state unless a federal question has been both raised and decided in the state court below. *Yee v. City of Escondido*, 403 U.S. 419, 523-33 (1992) (in reviewing judgments of state courts under 28 U.S.C. § 1257, the Court

will refuse to consider claims that were not raised or addressed below). *See also Beck v. Washington*, 369 U.S. 541, 549-53 (1962) (because petitioner failed to argue equal protection in state court).

It should be pointed out that the Nebraska Constitution at Art. I, § 21 provides "the property of no person shall be taken or damaged for public use without just compensation therefor." At no time in any pleading in this case have the Petitioners cited the Fifth or Fourteenth Amendment of the United States Constitution.

It is well settled in this Court that it must be made to appear that some provision of the federal, as distinguished from the state, constitution was relied upon and that such provision must be set forth. *New York Central & H.R. Co. v. New York*, 186 U.S. 269, 273 (1902).

Numerous cases have held that the Court has no jurisdiction to exercise its appellate jurisdiction over state court judgments under § 1257 unless a federal question has been both raised and decided in the state court. As Justice Story stated in *Crowell v. Randell*, 10 Pet. 368, 391 (1836), "[i]f both of these [the raising and the deciding] do not appear on the record, the appellate jurisdiction fails." The rule of *Randell* has evolved into the axiom that a federal claim cannot be considered by the Court unless it has either been raised in the state court or considered and resolved by the state court. *McGoldrick v. Compagnie Generale*, 309 U.S. 430, 434 (1940); *Hill v. California*, 401 U.S. 797, 805 (1971). This Court has stated many times that when

> [t]he highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state

> court, unless the aggrieved party in this Court can affirmatively show the contrary.

Street v. New York, 394 U.S. 576, 582 (1969).

In summary, this case is unlike *Washington v. Chrisman*, 455 U.S. 1, 5 n. 2 (1982) where repeated references in the state court opinion "to the Fourth Amendment and our cases construing it" made it clear that the decision did not rest on an independent state ground. *See also Oregon v. Kennedy*, 456 U.S. 667, 671 (1982) (where a "fair reading of the opinion below convinces us" that the state court "rested its decision solely on federal law").

SUBSTANTIAL FEDERAL QUESTION

The jurisdictional requirements formalized in § 1257 require the raising of a substantial federal question. The rule requires that for the purposes of certiorari, the validity of a federal right must be "drawn in question" and "specially set up or claimed."

This case is a "garden variety" condemnation. It is a typical conflict of opposing expert witnesses in a condemnation case regarding value. In the final analysis, it is clear that the jury found the opinion of damages offered by the City more credible than that of the Appellants and within the range of evidence.

In *State Dep't of Roads v. Dillon*, 175 Neb. 444, 122 N.W.2d 223 (1963), the Nebraska Supreme Court described the identical issue before this Court as follows:

> [1] [T]he sole matter before us at this time is an evaluation of the weight and credibility of the testimony to determine whether the amount of the

> verdict and the judgment of the trial court were purely and excessively wrong under applicable rules of law.

Id. at 446, 122 N.W.2d at 225.

In the present matter, the jury verdict fell in between the conflicting expert testimony presented by the Petitioners and Respondent. As noted by the Nebraska Supreme Court in *Iske v. Metropolitan Utilities Dist. of Omaha*, 183 Neb. 34, 157 N.W.2d 887 (1968), this situation is a frequent one in condemnation cases. And in such a situation, the Court in *Iske* held that:

> The weight and the credibility of the testimony of either lay or expert witnesses is for the jury. Expert opinion evidence, widely varying in this case, is to be considered and weighed by the triers of fact like any other testimony. The expert witnesses' testimony is purely advisory and is not binding on the triers of fact. The amount of damages sustained is peculiarly of a local nature and ordinarily is to be determined by the jury and this court will not ordinarily interfere with the verdict if it was based upon admissible testimony. When the evidence is conflicting the verdict of the jury will not be set aside unless it is clearly wrong.

Id. at 49, 157 N.W.2d at 897. *See also Jensen v. State Dep't of Roads*, 184 Neb. 802, 172 N.W.2d 607 (1969).

Here, the jury was presented with a range of evidence valuing damages to the subject property. The jury returned an award of $424,270.00 which was within the range of the testimony and which was consistent with the City's opinion as the fair market value of the property. This verdict should be

sustained as being within the range of testimony. *Zwygart v. State of Neb. Dep't of Roads*, 230 Neb. 128, 430 N.W.2d 301 (1988).

II.

THE DECISION OF THE NEBRASKA SUPREME COURT EXCLUDING HYPOTHETICAL INCOME IS CONSISTENT WITH THE GENERAL RULE.

An attempt to value unimproved land by capitalizing hypothetical income from an imaginary apartment complex has such speculative probative value that it was properly excluded under Nebraska law. It should be noted that comparable sales were available, the Petitioners introduced ten alone.

Nebraska is not unique in excluding the "capitalization of hypothetical income" method of valuation in eminent domain proceedings. As it states in 4 *Nichols on Eminent Domain*, § 12B.09[3] (3d ed. rev. 1994), "the capitalization of hypothetical income method of valuation has generally been rejected by the courts."

A leading case in this area out of New York is *Levitin v. State of New York*, 12 A.D.2d 6, 207 N.Y.S.2d 798 (N.Y. App. Div. 1069), *reargument denied, Levitin v. State of New York*, 13 A.D.2d 611, 214 N.Y.S.2d 712 (N.Y. App. Div. 1961). In *Levitin*, the Court found reversible error in a trial court's allowance of testimony from a condemnee's experts who calculated the value of the condemned property by capitalizing the income from a nonexistent motel which would contain 129 units. The Court held:

> Such a method of valuation of vacant, unimproved land is completely unprecedented. There is no

> authority cited by claimants in support of it and none is to be found, for how can income be capitalized to produce a residual land value when the appropriated land is neither producing income nor equipped to produce such income? . . . *a claim is improper where it is based entirely on hypothetical profits estimated from a nonexistent business* (*New York Central Railroad Co. v. Maloney*, 234 N.Y. 208, 137 N.E. 305; *Niagra, Lockport & O.P. Co. v. Horton*, 231 A.D. 402, 247 N.Y.S. 761). (Emphasis added.)

4 *Nichols on Eminent Domain*, § 12B.09[3] (3d ed. rev. 1994). The *Levitin* Court recognized that the valuation of property through capitalization of hypothetical income is too speculative to be admissible.

In a case from Connecticut, *Tandet v. Urban Redevelopment Commission, Etc.*, 179 Conn. 293, 426 A.2d 280 (1979), the Connecticut Supreme Court reversed a state referee's award to a condemnee which was based on the capitalization of hypothetical income from an office building not yet built on the condemned property. The Connecticut Supreme Court stated:

> Although we are mindful of the sophisticated appraisal methods utilized in the profession and the quantum of statistical forecast data available, we are also mindful of the inherent unreliability of many such distant projections, which must, of necessity, take into consideration numerous factors and variables, known and unknown, that influence investment decisions.

Id. at 284. The Court concluded that the "[e]vidence of the distant cost of the conversion of the profits to be derived

therefrom. . .would be speculative and, therefore, inadmissible." *Id.* at 285.

Likewise, in *State by Comm'r of Transp. v. Mehlman*, 118 N.J. Super. 587, 289 A.2d 539 (App. Div. 1972), a New Jersey Superior Court reversed a trial court's decision which admitted opinion testimony of the value of condemned property based on capitalization of hypothetical income from a nonexistent building. That court held:

> To permit jury to do so, would be placing our stamp of approval on [the witness's] projection of a hypothetical building on vacant land, and capitalizing hypothetical income anticipated to be derived therefrom, without considering the multitude of unknown variables in erecting, leasing, operating, and financing the project. Such an approach is improper.

Id. at 541.

In *U.S. v. 1.16 Acres, etc., City of Stamford, Conn.*, 300 F.Supp. 1021 (D. Conn. 1969), a U.S. district court in Connecticut clearly described why the capitalization of hypothetical income is not a sufficiently reliable form of valuation to introduce at trial. The court stated:

> A fundamental problem encountered in the use of the "cost-income" approach in the case of an apartment still in the planning stage is that a relatively slight error in prognostication with respect to the estimated cost, income, or operating expenses of the prospective enterprise results in a disproportionately large variation in the ultimate residual land value. By way of example in the present case . . . an increase of about 25% in construction costs . . . would have reduced the residual land values arrived at by these experts by

> approximately 70% and 62% respectively. Furthermore. . .a decrease in rental income of $1,000 would result in a corresponding decrease in land value of over $15,000. . . .

Id. at 1024. This example illustrates why the capitalization of hypothetical income is too speculative to be admitted at trial. A slight miscalculation or inaccurate assumption can cause a large variation in the ultimate valuation. This problem is exacerbated by the fact that the numerous variables that must be included in the calculations are almost impossible to predict with a high degree of accuracy.

In the case at bar, the hypothetical valuation evidence sought to be introduced by Petitioners' experts was far too speculative to be admitted at trial. There is no way to determine with any precision the cost of building such a complex, labor or weather delays, whether financing could be obtained, whether a building permit could be obtained, whether future tenants would pay the rental rates to be charged, etc., etc., etc. Any error made in estimating such variables would have a large impact on the final valuation. Therefore, the Nebraska district court properly excluded Petitioners' proffered valuation testimony based on the capitalization of hypothetical income because such testimony would be far too speculative.

CONCLUSION

> Just compensation must give a party a full and perfect equivalent in money. The condemnee ought to be placed in as good financial position as he would have occupied had the property not been taken.

Mononagahela Navigation Co. v. United States, 148 U.S. 312, 326 (1893). Clearly this was done in this case.

Respectfully submitted,

Dana W. Roper
Counsel of Record
City Attorney's Office
City of Lincoln, Nebraska
555 South 10th Street
Lincoln, Nebraska 68508
(402) 441-7290